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CASES

IN THE

COURT OF COMMON PLEAS

AND

EXCHEQUER CHAMBER.

BY

JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. IV.

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JUDGES

OF

THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., L. C. J.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Right Hon. Sir JOHN VAUGHAN, Knt.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Hon. Sir THOMAS COLTMAN, Knt.

ATTORNEY-GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.

TABLE OF CASES.

Abbotts *v.* Kelly - - 256
Allenby, Foster *v.* - 535
Anderson, Bank of England *v.* - - - - 50

Baden *v.* Flight - - 412
Basingstoke Canal Company, Pontet *v.* - 182
Bates, In re - - - 396
Bath, Doe *d.*, *v.* Clarke, 203
——, (Mayor) *v.* Pinch - 299
Beesley, Prime *v.* - 37
Betteley *v.* M'Leod - - 131
Bicknell, Tipper *v.* - 462
Binns, Whitmore *v.* - - 571
Blatchford *v.* The Mayor of Plymouth - - 429
Boulton *v.* Welsh - 425
Bowman *v.* Willis - - 387
Branson, Ex parte - 539
Brettillot *v.* Sandos - - 201
Brittan *v.* Jones - - 393
Britton, Jaulerry *v.* - - 380
Brown, Ernest *v.* - 385
Browne, Richards, *v.* - 262
Burbidge, Henry *v.* - 296

Campbell, Tyler *v.* - - 384
Canterbury (Archbishop) *v.* Tubb - - - 543
Capps, Doe *d.* Capps *v.* - 468
Carlisle, Garland *v.* - 587
Carr, Doe *d.*, *v.* Jordan - 370
Cholmondeley *v.* Payne 418
Clarke, Doe *d.* Bath *v.* - 203
——— *v.* Vestris - 391
Cobden, Green *v.* - - 486
Cole, Young *v.* - - 489
Cornish *v.* Keene - 337
Cox *v.* King - - - 553

Daffey, Doe *d.*, *v.* Sinclair 477
Davis *v.* Jones - - 202
Devas *v.* Venables - 123
Deverill, Trentham *v.* 128
Doe *d.* Bath *v.* Clarke 203
——— Capps *v.* Capps 468
——— Carr *v.* Jordan - 370
——— Daffey *v.* Sinclair 477
——— Peter *v.* Watkins 155
——— Phillips *v.* Roe - 359
——— Rhodes *v.* Robinson 396
Drummond, Pigou *v.* - 573
Dumsday, dem., Hughes, ten. 209
Dunnage *v.* Kemble - - 365

England (Bank of) *v.* Anderson - - 50
Ernest *v.* Brown - - 385

Fallowes, Robson *v.* - 43
Finch, South *v.* - - 293
Firmin, Stanhope *v.* - 39
Fisher, ten., Tolson, dem. 569

Flight, Baden *v.* - - 412
Foster *v.* Allenby - 535

Gardner, ten., Piercy, dem. 512
Garland *v.* Carlisle - 587
Godwin, Lucas *v.* - 502
Goodwin, Lucas *v.* - - 300
Gowar, Vere *v.* - - 287
Gower *v.* Von Dadelszen 453
Green *v.* Cobden - - 486

Hall, Wilkinson *v.* - 301
Halliday *v.* Lawes - - 475
Harmer, Morison *v.* - 524
Henry *v.* Burbidge - - 296
Holliday *v.* Lawes - 354
Hughes, ten., Dumsday, dem. 209

James *v.* Salter - - 168
Jaulerry *v.* Britton - 380
Jones, Brittan *v.* - - 393
——, Davis *v.* - - 202
——, Skinner's Co. *v.* - 271
—— *v.* Vestris - 394, 395
Jordan, Doe *d.* Carr *v.* - 370

Keene, Cornish *v.* - - 337
Kelly, Abbotts *v.* - - 256
Kemble, Dunnage *v.* - 365
King, Cox *v.* - - - 553
Knight *v.* Woore - 360

Lahee, Marks *v.* - - 137
Lawes, Halliday *v.* - 475
—— Holliday *v.* - - 354
Lindsay *v.* Wells - 471
Long, Staley *v.* - - 481
Lord *v.* Wardle - - 402
——, Wrench *v.* - - 381
Lorymer *v.* Vizeu - 190
Lucas *v.* Godwin - - 502
—— *v.* Goodwin - 300

M'Leod, Betteley *v.* - - 131
Marks *v.* Lahee - - 137
Massey *v.* Nanney - - 258
Memoranda - - - 379
Menlove, Vaughan *v.* - 244
Morgan *v.* Pebrer - 230
Morison *v.* Harmer - - 524
Morris *v.* Thompson - 295

Nanney, Massey *v.* - - 258
Norris *v.* Salmonson - 257

Overton *v.* Swettenham - 483

Payne, Cholmondeley *v.* 418
Pebrer, Morgan *v.* - - 230
Peter, Doe *d.*, *v.* Watkins 155
Phillipps, Wyllie *v.* - 474
Phillips, Doe *d.*, *v.* Roe 359
Piercy, dem., Gardner, ten. 512
Pigou *v.* Drummond - - 573
Pinch, Mayor of Bath *v.* 299
Plymouth (Mayor), Blatchford *v.* - - - 429
Pole *v.* Rogers - - 479
Pontet *v.* Basingstoke Canal Co. - - - 182
Potter v. *Starkie* - - 718
Prime *v.* Beesley - - 37
Promotions - - - 379

Rhodes, Doe *d.*, *v.* Robinson 396
——, Webb *v.* - - 497
Rice, In re - - - 416
Richards *v.* Browne - - 262
Robinson, Doe *d.* Rhodes *v.* 396
Robson *v.* Fallowes - - 43
Roe, Doe *d.* Phillips *v.* - 359
Rogers, Pole *v.* - - 479
Roux *v.* Salvador - - 1
Russell *v.* Yorke - - 422

Salomonson, Norris *v.* - 257
Salter, James *v.* - - 168
Salvador, Roux *v.* - 1
Sandos, Brettilot *v.* - - 201
Sherman *v.* Tinsley - 286
Sinclair, Doe *d.* Daffey *v.* 477
Skinners' Co. *v.* Jones - 271

South *v.* Finch - - 293
Staley *v.* Long - - - 481
Stanhope *v.* Firmin - 39
Starkie, Potter v. - - 718
Stevens *v.* Willingale - 255
Stocken *v.* Wedderburne 570
Swettenham, Overton *v.* 483

Thompson, Morris *v.* - 295
Tinsley, Sherman *v.* - - 286
Tipper *v.* Bicknell - 462
Tolson, dem., Fisher, ten. 569
———, dem., Watson, ten. 577
Trentham *v.* Deverill - 128
Tubb, Archbishop of Canterbury *v.* - - - 543
Tyler *v.* Campbell - - 384

Vaughan *v.* Menlove - 244
Venables, Devas *v.* - 123
Vere *v.* Gowar - - - 287
Vestris, Clarke *v.* - - 391
———, Jones *v.* - 394, 395
Vizeu, Lorymer *v.* - - 190
Von Dadelszen, Gower *v.* 453

Wardle, Lord *v.* - - 402
Watkins, Doe *d.* Peter *v.* 155
Watson, ten., Tolson, dem. 577
Webb *v.* Rhodes - - 497
Wedderburne, Stocken *v.* 570
Wells, Lindsay *v.* - - 471
Welsh, Boulton *v.* - - 425
Whitmore *v.* Binns - 571
Wilkinson *v.* Hall - - 301
Willingale, Stevens *v.* - 255
Willis, Bowman *v.* - - 387
Woodroffe *v.* Wootton - 364
Woore, Knight *v.* - 360
Wootton, Woodroffe *v.* - 364
Wrench *v.* Lord - - 381
Wyllie *v.* Phillipps - - 474

Yorke, Russell *v.* - - 422
Young *v.* Cole - - - 489

ERRATUM.

Page 524, Marginal note, last line but one, after "self-styled," insert "hygeist."

TABLE OF STATUTES.

13 Edw. 1 (West. 2), c. 48—512, 577.
32 Hen. 8, c. 2, s. 2—209, 512.
34 & 35 Hen. 8, c. 4, s. 1—587 et seq.
13 Eliz. c. 7, s. 2—ib.
1 Jac. 1, c. 15, s. 5—ib
21 Jac. 1, c. 16—128, 512.
c. 19—587 et seq.
22 & 23 Car. 2, c. 9—265.
5 W. & M. c. 20—50 et seq.
7 & 8 Will. 3, c. 31—ib.
8 & 9 Will. 3, c. 20—ib.
9 & 10 Will. 3, c. 44—ib.
4 Anne, c. 4, s. 8—587 et seq.
5 Anne, c. 22—ib.
6 Anne, c. 22—50 et seq.
3 Geo. 1, c. 8—ib.
11 Geo. 1, c. 9—ib.
2 Geo. 2, c. 23, s. 23—416, 539.
c. 28, s. 1—301
5 Geo. 2, c. 30—587 et seq.
7 Geo. 2. c. 8—43, 230
c. 20, s. 1—468
15 Geo. 2, c. 13—50 et seq.
19 Geo. 2, c. 32—578, et seq.
21 & 22 Geo. 3, (Irish)—90
33 Geo. 3, c. xvi—182.
34 Geo. 3, c. xlii—553.
39 & 40 Geo. 3, c. 28—50 et seq.
46 Geo. 3, c. 65—587 et seq.
c. 135, s. 1—ib.
48 Geo. 3, c. 123, s. 1—477.
49 Geo. 3. c. 121—587 et seq.
53 Geo. 3. c. 141, s. 2—258.
55 Geo. 3, c. 184, sched. part 1, "Agreement"—293.
"Mortgage"—381.
59 Geo. 3, c. 12, s. 17—381
6 Geo. 4, c. 16, s. 82—123.
7 Geo. 4, c. 46—587 et seq.
9 Geo. 4, c. 14—128.
1 Will. 4, c. 22, s. 4—479.
2 Will. 4, c. 39, ss. 3, 5—287.
s. 8—570, 571.
s. 10—256.
3 & 4 Will. 4, c. 27, ss. 2, 3—168.
c. 42, ss. 11, 12—471
ss. 26, 27—387
c. 74—396, 539.
c. 98—50 et seq.

IN THE EXCHEQUER CHAMBER.

MICHAELMAS TERM, 7 WILL. IV.

THE JUDGES PRESENT WERE—LORD ABINGER, C. B., LITTLEDALE, J., PATTESON, J., WILLIAMS, J., PARKE, B., BOLLAND, B., AND ALDERSON, B.

ROUX and Another *v.* SALVADOR.

1836.

Tuesday, Nov. 15th.

[In Error from the Common Pleas.]

ASSUMPSIT on a policy of assurance subscribed by the defendant for 200*l.* Plea, non assumpsit.

By a special verdict it was found that—The policy on which the action was brought was effected on goods per the General La Fayette, and other ship or ships, at and from, among other ports or places in the Pacific Ocean, Valparaiso, to any port or ports in France and the United Kingdom of Great Britain, with leave to touch and trade at any place in America or any where else; to effect all transhipments; and including the risk of craft to and from the vessel or vessels. The usual perils were insured

Hides were shipped on board a vessel at Valparaiso for Bordeaux. The ship sailed from Valparaiso on the 13th May, and on the 7th July put into Rio de Janeiro in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impracticable to carry them in specie to the termination of the voyage, they being in such a state that they must either have been annihilated by putrefaction or thrown overboard, they were sold at Rio for one fourth of their value. On the 23rd July, the ship set sail from Rio on her voyage to Bordeaux, and was stranded on the 29th September at the entrance of the Garonne. In an action on a policy containing a memorandum declaring "cocoa and hides free of particular average unless the ship were stranded," it appeared that the assured received the news of the damage and of the sale of the hides at the same time:—Held—first, that this was not a stranding of the ship within the meaning of the memorandum, so as to entitle the assured to recover for an average loss—secondly, that the assured were entitled to recover as for a total loss, without abandonment.

1836.

ROUX v. SALVADOR.

against; and the policy, which was for 700*l.*, had the following memorandum subscribed:—"N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5 per cent.; and all other goods, also the ship and freight, are warranted free from average under 3 per cent., unless general, or the ship be stranded." The policy was declared to be on goods, specie, or bullion, as interest might appear: to pay average on each species of goods by following landing numbers of the value of 100*l.* each, as if separately insured. Cocoa and *hides free of particular average, unless the ship were stranded:* in case of average on the hides, the assurers were to pay the expense of washing and drying in full.

Under this policy, the plaintiff, on the 6th May, 1831, caused to be shipped on board the ship Roxalane, at Valparaiso, for Bordeaux, in France, 1000 salted hides, of the value of 1117*l.*, his property, which hides were intended to be insured by the said policy, and were duly declared thereupon, and a bill of lading duly signed by the captain in the ordinary form. On the 13th May, 1831, the said ship, being seaworthy, with the said 1000 hides, and other hides on board thereof, set sail from Valparaiso aforesaid, on her said voyage towards Bordeaux. On the 5th June, 1831, in the course of her said voyage, the said ship, with the said goods on board thereof, encountered bad weather and sprung a leak, and it thereby became necessary, for the safety of the ship and cargo, that the said ship should put into a port for repair, and the said ship did accordingly put into Rio de Janeiro, in Brazil, being the nearest port, for repair. On the 7th July, 1831, the whole of her cargo was there landed; and it was then found that the said hides were damaged by the said perils and dangers of the seas, as follows; that is to say, that they had been washed or wetted by the sea-water which had entered into the vessel through the said leak,

1836.

ROUX v. SALVADOR.

and also by the effect of the dampness produced in the hold by the leak, and in consequence thereof a partial fermentation ensued, the progress of which could not be stopped by any means practicable in Rio de Janeiro; and, in consequence of the progressive putrefaction of the said 1000 hides, it was impossible to carry them, or any part thereof, in a saleable state to the termination of the voyage for which they were insured: if it had been attempted to take them to Bordeaux, they would, by reason of such progressive putrefaction as aforesaid, altogether have lost the character of hides before they arrived there. On the 27th August, 1831, at Rio de Janeiro, the said 1000 hides in said policy mentioned, according to the ordinances of the French consul-general there, were sold, by public auction, for the gross sum of 273*l.*: the same were bought by the purchasers for the purpose of being tanned, and were tanned accordingly. The ship Roxalane being repaired, and the leak stopped, which was in her bottom, she, on the 3rd October, 1831, sailed from Rio de Janeiro without the said hides in the said policy mentioned, but with such part of her cargo reloaded on board as had not been sold; and, in the course of her voyage from Rio de Janeiro to Bordeaux, was stranded at the entrance of the river Garonne, on the 29th December, 1831. The earliest intelligence of the damage, and of the sale of the said 1000 hides, was received at the same time by Messrs. Devaux & Co., the agents for the said plaintiffs, by a letter from Bordeaux.

The case was twice argued in the court of Common Pleas—in Easter and Trinity Terms, 1835, by *Maule*, for the plaintiffs, and *The Attorney General* for the defendant. Judgment having been given for the defendant (vide ante, Vol. 1, 491), the record was brought by writ of error into the Exchequer Chamber, where it was again argued at considerable length by the same learned gentlemen, on the 12th May, 1836.

1836.

ROUX v. SALVADOR.

Argument for the plaintiffs.

Maule, for the plaintiffs in error.—In the argument in the court below, three points were made on the part of the plaintiffs—first, that the stranding of the vessel, under the circumstances stated in the special verdict, entitled the plaintiffs to recover for an average loss, the clause in the policy declaring the articles in question free from average, being qualified, and not applying to the case of a stranding of the ship—secondly, that the loss was an *actual* and not a mere *constructive* total loss—thirdly, that no notice of abandonment was necessary. The court below held that the stranding of the vessel, the goods not being then on board, was not such a stranding as to entitle the assured to recover as for an average loss; that the loss was a *constructive* total loss; and that notice of abandonment *was* necessary to entitle the assured to recover. This judgment, with respect to the first and third points decided, is clearly erroneous.

1. That there was a stranding within the meaning of the policy.

1. As to the stranding. The words of the memorandum in the policy, "unless the ship be stranded," were originally introduced for the purpose of excluding inquiry and preventing litigation. By our law, they amount to a condition; and whether the loss be the consequence of the stranding or not, is perfectly immaterial. *Burnett* v. *Kensington*, 7 T. R. 210, 1 Esp. 416, Peake's Add. Cas. 71, is not in principle at all distinguishable from the present case. There, a ship, with a cargo of fruit, struck on a sunken rock, and received great damage, so that it became necessary to run her on shore, in order to save both ship and cargo. The ship, however, arrived at her port of destination, but with the fruit greatly damaged, not by the *stranding*, but solely in consequence of the ship striking on the rock. And it was held that the insurer was liable for this partial loss, though it did not arise from the stranding. "The words of the policy," says Lord Kenyon, "are general: then comes the memorandum—'corn, fish, salt, fruit, flour, and seed, free from average, unless ge-

neral, or the ship be stranded.' This, therefore, lets in a general average; and I do not know how to construe the words grammatically, but by saying, that, *if the ship be stranded, that destroys the exception, and lets in the general words of the policy.* If a provision be made in any instrument, and it be then said that certain things shall be excepted unless another thing happen; if that other thing do happen, it destroys the exception, and gives effect to the general operation of the deed." [Lord *Abinger*, C. B.—How is the doctrine of *Burnett* v. *Kensington* applicable to a case like this, where, at the time the stranding took place, the risk as to the particular goods, is already terminated? *Alderson*, B.—To bring this within the case cited, it should at least be shewn that the loss *might* have arisen from the stranding.] In *Burnett* v. *Kensington*, the loss had happened before the stranding of the vessel. In *Hoffman* v. *Marshall*, ante, Vol. 2, 559, which is precisely the converse of this case, the court of Common Pleas held that the words of the condition were to be construed strictly and literally. There, goods were insured upon a voyage from G. to R. "including risk of craft to and from the ship," the risk to continue "until they should be discharged and safely landed," and "free of particular average unless the ship should be stranded:" arrived at R., the goods were put on board a lighter for the purpose of being landed: the lighter was stranded, and an average loss was in consequence sustained; and it was held that this loss was not covered by the policy. Tindal, C. J., in delivering the judgment of the court, there says: "The words of the warranty in question are general, with one single exception: the assured expressly warrants the linseed cakes 'to be free of particular average,' with the single exception, 'unless the *ship* be stranded;' and, taking the latter words to be words of condition, and that the policy is opened to cover any particular average loss on the goods if the condition has hap-

1836.

ROUX v. SALVADOR.

pened, according to the well-established doctrine on this head, it would be enough to say that the condition specified has never taken place; for, the *ship* has not been stranded, and the warranty remains in full force, that is, a general warranty against liability for an average loss."

2. That the loss was total.

2. Upon the second point, the judgment of the court below was in favour of the plaintiffs, viz. that the loss was a constructive total loss; holding the necessary inference to be drawn from the evidence to be, that, in consequence of a peril insured against, it became impracticable to carry the hides in specie to the termination of the voyage for which they were insured. The loss is clearly total where the transmission of the goods to their port of destination becomes impossible by reason of a peril insured against. Salvage is by no means incompatible with a total loss—*Brooks* v. *MacDonnell*, 1 Younge & Collier, 500.

3. That notice of abandonment was not necessary.

3. Whether the loss were a constructive or an actual total loss, still, upon the facts found, it was of such a nature as to preclude the necessity for any notice of abandonment. Where the adventure *may* be carried on to the conclusion, though at some loss, whether great or small, notice of abandonment is necessary: but, where the adventure is of necessity terminated, notice of abandonment would be idle. A degree of confusion seems to have been imported into the cases on this subject, from not sufficiently distinguishing between abandonment and notice of abandonment. [Lord *Abinger*, C. B.—Where nothing can be done to save the ship or cargo from utter destruction, it would seem absurd to require a notice of abandonment. I do not, however, perceive the distinction suggested between abandonment and notice of abandonment.] The term "constructive total loss" is a very loose and inconvenient one. To make a case for abandonment, it must be a loss that may or may not according to circumstances turn out to be total. If the ship be lost and the goods

saved, an abandonment is necessary; the assured is not bound to provide another vessel in which to prosecute the adventure. But, in order to render the loss total where nothing remains of the ship but the mere timbers, or of the cargo but a mere mass of putrefaction, no abandonment can be necessary. The judgment of the court below upon this part of the case proceeded mainly upon the cases of *Mitchell* v. *Edie*, 1 T. R. 608, *Allwood* v. *Henckell*, Park Ins. 280, Marsh. Ins. 509, and *Hodgson* v. *Blackiston*, Park Ins. 281, n. In the first of these cases, an insurance was made on goods from Jamaica to London. The ship was captured by an American privateer; and, in a few days afterwards, the captor, having stripped her of her stores and part of her rigging, and having taken out some of her hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3 per cent.; and the part of the cargo taken out did not amount to that sum. In consequence of the ship's losing a part of her crew, it became impossible for her to pursue her voyage, and she was obliged to bear away for Charlestown, where she was put into the hands of one Cruden, a part owner, who sold the cargo. In an action on the policy, charging the insurers as for a total loss, a verdict was found for the defendant, there having been no notice of abandonment, which Buller, J., held to be necessary to entitle the plaintiff to recover. On a motion for a new trial, Ashhurst, J., as to this point, observed: "The general rule is, that, *where any part of the property insured has been saved*, the insured cannot recover as for a total loss, unless he make his election to abandon, and give reasonable notice to the underwriters of his intention." All that that case proves, is, that a sale not induced by a peril of the sea, does not dispense with the necessity of a notice of abandonment. In *Allwood* v. *Henckell*, goods were insured at and from London to Jamaica. The ship was taken by a French privateer within a few leagues

1836.

ROUX v. SALVADOR.

of Jamaica. Part of the property insured was taken out of the ship. The captain, boatswain, and all but seven men, were also taken out of her. In a fortnight after, as the captors were proceeding to America, the ship, with the remainder of her cargo, was re-taken by an English frigate, and sent into Antigua; and both were sold there under a decree of the vice-admiralty court, by a prize agent, who received the proceeds, to be paid over to the concerned, deducting one eighth for salvage, according to the prize act, 33 Geo. 3, c. 66. The capture and re-capture were entered at Lloyd's on the 15th February, 1795; but it was not known whither the ship was carried till the 30th March, when a letter was received at Lloyd's, addressed to the owners, freighters, and underwriters, from the judge of the vice-admiralty court at Antigua, informing them of the arrival of the ship, and of the sale of the ship and cargo under a decree of the court; and desiring to have some agent appointed to remit the proceeds to England. Powers of attorney were sent out in April by the insured for this purpose, with orders to remit the proceeds to the banking-house of Smith, Payne, & Smith, one of whom was agent to the insured. It was objected, on the part of the defendant, that, although the insured as well as the insurers were informed of the loss in the beginning of April, yet the insured did not abandon till August, near four months after the power of attorney had been sent out to Antigua. To this it was answered, that, the property having been absolutely sold and converted into money before the insured knew where the ship was taken to, the loss was total in its nature, and therefore there was no occasion to abandon. Lord Kenyon, who tried the cause, inclined to think that an abandonment was necessary, and that the case was the same as if the property had not been sold, but remained in specie at Antigua. And the plaintiff had a verdict only for the average loss. In *Hodgson* v. *Blakiston*, 1 Park Ins. 281, n., it was held

that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. There is no analogy whatever between these cases and the case now before the court: they merely decide that a sale will not excuse the want of an abandonment, where the other circumstances of the case render abandonment necessary. These three cases, therefore, the principal authorities upon which the judgment of the court of Common Pleas upon the third point proceeds, do not support that judgment. They only establish, that, where by the perils insured against the prosecution of the adventure is not rendered absolutely impossible, but only so far obstructed and rendered disadvantageous to the assured as to give him a right to cast the loss upon the assurers, a notice of his election to abandon is necessary, and the mere fact of a sale, though necessarily effected, makes no difference in the relative rights and liabilities of the parties. But in no case has it been held that notice of abandonment is required, where the subject matter of the insurance is by a peril insured against reduced to such a condition as to render the further prosecution of the voyage wholly impracticable. In *Cambridge* v. *Anderton*, 2 B. & C. 691, 4 D. & R. 203, R. & M. 60, 1 C. & P. 213, where the ship was so much damaged by perils of the sea, that, in order to render her seaworthy, it would cost more to repair her than she would be afterwards worth, and the captain sold her to a purchaser who partially repaired her and sent her upon a voyage which she never completed, in consequence of her infirmity; it was held that the assured were entitled to recover as for a total loss, without giving notice of abandonment. Tindal, C. J., in delivering the judgment of the court below, says (ante, Vol. 1, 517): "The necessity of abandonment in the present case, so far as it stands upon authority, rests on the generality of expression used in all the early cases, that, wherever the assured claims for a total loss,

1836.

ROUX v. SALVADOR.

there being any thing saved, he must first relinquish to the underwriter all his interest in what remains, and upon the express authority of the cases referred to; in opposition to which there is found no other decided case than that of *Cambridge* v. *Anderton:* so that the balance of authority is clearly in favour of the position that abandonment is necessary in the present case. And, upon principle, if the matter were res integra, we should come to the same conclusion; for, as the assured in no case is bound to consider the loss a total loss, but may always take to what is saved, and recover for an average loss, if it is to be held that abandonment is unnecessary where there has been a sale, the underwriter can have no certainty as to his right or his liabilities before the assured determines his election by bringing the action for a total loss." The same reasoning would equally apply to the case of a partial loss: it would always be convenient for the underwriter to receive early intimation of any claim that is to be made upon him. It is not, however, upon this principle that the necessity of notice of abandonment rests: it arises out of the right of the assured in certain cases to elect either to proceed with the adventure, charging the underwriters for an average loss, or by abandonment to cast the further prosecution of the adventure upon them: where, therefore, the further prosecution of the adventure is by a peril insured against rendered wholly impossible, notice of abandonment must be idle and unnecessary. *Read* v. *Bonham*, 6 Moore, 397, 3 Brod. & Bing. 147, amounts to nothing as an authority for the position for which it was cited in the court below. There, a notice of abandonment was given; and the only question was as to whether or not such notice had been given in time; the court held that it had. In *Parry* v. *Aberdein*, 9 B. & C. 411, 4 M. & R. 343, there was also an abandonment: but it appears from the reports of the case that the assured there had heard of the destruction of the ship before they learned that the ad-

venture was determined by the total destruction of the cargo. In *Cambridge* v. *Anderton*, 1 C. & P. 215, n., Bayley, J., says: "I take the legal principle to be, that, if by any perils within the policy, the ship ceases to retain the character of a ship, the party may sell her and recover as for a total loss, without any abandonment." This dictum is fully warranted by the previous authorities, and has never fairly been impugned. In that case, the ship was so much damaged by perils of the sea, that, in order to render her sea-worthy, it would cost more to repair her than she would afterwards be worth, and the captain sold her to a purchaser, who partially repaired her, and sent her upon a voyage which she never completed, in consequence of her infirmity; and it was held that the assured were entitled to recover as for a total loss, without giving notice of abandonment—2 B. & C. 491, 4 D. & R. 203. In *Doyle* v. *Dallas*, 1 M. & Rob. 48, where a ship, being wrecked, was sold by the owner and master, and soon after got off by the purchaser, and repaired, though at a great expense, it was ruled by Lord Tenterden that the underwriters would be liable as for a total loss, provided the jury should think that the assured had exercised a sound judgment, and the sale was for the benefit of all parties: and in that case it seems to have been assumed that abandonment was not necessary. In *Robertson* v. *Clarke*, 8 Moore, 622, 1 Bing. 445, where a ship was so shattered in a storm that it was found, on survey, that the expenses of repairing her would far exceed her original value, and the captain sold her bonâ fide for the benefit of all concerned, and the purchasers shortly afterwards broke her up—it was held that this was such an urgent necessity as justified the sale: it does not appear, nor was it ever suggested, that a notice of abandonment was ne-necessary there. In *Mullett* v. *Sheddon*, 13 East, 304, an American, properly licensed to export saltpetre from Calcutta to America, having insured it for the voyage, the

1836.

ROUX v. SALVADOR.

ship was seized by the captain of a British ship of war at the Cape of Good Hope, and the cargo condemned, unshipped, and sold by order of the court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captors' costs: it was held that the assured might recover as for a total loss, without notice of abandonment, the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there. And Lord Ellenborough said: "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner: but here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away." "Abandonment," says Abbott, J., in *Cologan* v. *The London Assurance Company*, "excludes any presumption which might have arisen from the silence of the assured, that they meant to adhere to the adventure." No such presumption could exist where, as in the present case, the damage and sale of the goods came to the knowledge of the assured at the same time. As well, therefore, upon principle as upon the authority of all the cases, it is perfectly clear, that, under the particular circumstances stated in this special verdict, no abandonment was necessary; consequently the judgment of the court below cannot be supported.

Argument for the defendants. 1. That there was no stranding as affecting the goods in question.

Sir *John Campbell*, A. G., for the defendants in error. —1. The first question is, whether or not the plaintiffs are entitled to recover as for an average loss. It may

1836.

ROUX v. SALVADOR.

be conceded that they would have been so entitled but for the memorandum declaring the goods which were the subject matter of the insurance to be free from average unless the ship were stranded. The only rational construction which that memorandum or limitation is susceptible of, is, that the stranding, to let in the average, must be a stranding *whilst the goods are on board.* A stranding of the vessel either before the goods are shipped or after their discharge, can have no more effect upon the goods than a stranding before the commencement of the voyage insured, and cannot be held to be within the meaning of the policy. *Hoffman* v. *Marshall,* 2 Scott, 559, is wholly distinguishable; there there was no stranding of the ship at all. Here the stranding took place after the termination of the adventure on these goods—after the policy was functus officio. [Lord *Abinger,* C. B.—We are all agreed that you need not consider the first point: the condition in the memorandum has not been complied with.]

2. That the loss was not in its nature total.

2. This was not a total loss. To make it so, the goods must have ceased to exist at the termination of the adventure. Here, however, at the time the adventure was put a stop to, viz. on the 31st of August, 1831, the hides were still existing and valuable as hides, and were sold as such. The loss might then have been treated as a partial loss; but there is no authority direct or analogous to shew that it could be turned into a total loss, whether actual or constructive, by a premature sale. In *Cocking* v. *Fraser,* Park Ins. 181, Marsh. Ins. 144, it was held, that, if the articles for which the insurer is warranted to be free of average, unless general, specifically remain after the voyage, though by sea damage they are rendered of no value, yet, if the ship has not been stranded, this is only a partial loss, for which the insurer is not liable; and Lord Mansfield said: "The insurer undertakes for all losses except particular damage, unless the ship be stranded:

1836.

ROUX v. SALVADOR.

he engages against a total loss. What is a total loss? The total loss of the thing insured is *the absolute destruction of it by the wreck of the ship.* The fish may all come to port; though, from the nature of the commodity, it may be damaged, it may be stinking: still, as the commodity *specifically* remains, the underwriter is discharged." In no case has it ever been held, that, where the goods are landed and sold (under the denomination under which they were originally bought) at an intermediate port, the loss may be treated as total. The memorandum prevents that from being a total which *can* be an average loss: this is precisely the purpose for which the memorandum was introduced. [Lord *Abinger*, C. B.—If by a peril of the sea the goods are prevented from arriving at their destination, what is that but a total loss?] The loss in this case is, within the meaning of the policy, an average loss only. The decision of the court of Common Pleas on this point turned principally upon the case of *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474. There, the policy (on fruit, from Cadiz to London,) contained the usual memorandum; in the course of the voyage, the fruit was so much damaged by sea water that it became rotten, and stunk: and, on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo: the ship also, being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard: it was held (and the propriety of that holding it is not necessary to dispute) that the assured were entitled to recover for a total loss. If the hides in the present case had been thrown overboard as valueless, then *Dyson* v. *Rowcroft* would have been a strong authority for the plaintiffs. In *Manning* v. *Newnham*, Park Ins. 260, Marsh. Ins. 585, 3 Doug. 130, 2 Camp. 624, n., as also in *Wilson* v. *The Royal Exchange Assurance Company*, 2 Camp. 623, the ship was lost, and the further prosecution of the adventure rendered impossible. The authority of

1836.

ROUX v. SALVADOR.

those cases, however, is considerably shaken by *Glennie* v. *The London Assurance Company*, 3 M. & S. 371, where, upon an insurance at and from C. to L. on goods in a ship by name, until the same should be there safely discharged and landed (rice free of particular average), and the ship, with rice and other goods, arrived within the limits of the port of L., but before she could be brought to her moorings, or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at L., and sold, and produced upon the whole little more than sufficient to pay freight and salvage, but the rice did not produce sufficient to pay the freight: it was held that this was a case of particular average only, and therefore, as to the rice, the underwriter was exempted by the warranty. The mere retardation of the voyage is not the subject of an abandonment. Thus, in *Anderson* v. *Wallis*, 2 M. & S. 240, 4 Camp. 440, an insurance was effected on goods (copper and iron) at and from London to Quebec, warranted free of particular average, and the ship, owing to sea damage in the course of her voyage, was obliged to run into port and undergo repair, and some part of the cargo was damaged; the repairs detained the ship so long as to prevent her reaching Quebec that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship sailed on another voyage: it was held that this was not a total loss of the goods, and that the assured could not abandon. So, in *Hunt* v. *The Royal Exchange Assurance Company*, 5 M. & S. 47, it was held that a loss of voyage for the season by perils of the seas, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average &c., where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding on

1836.

ROUX v. SALVADOR.

the voyage. "The object of the memorandum," says Bayley, J., "was, to place the subject-matter of insurance, which was of a perishable nature, on the footing of an imperishable commodity; to cast on the assured the risk of partial damage, leaving to the underwriter the risk of total loss." If the goods now in question had been goods of an imperishable nature, the assured undoubtedly could not by selling them at Rio cast upon the underwriters as a total loss that which would otherwise have been partial only. In *Gardner* v. *Salvador*, 1 M. & Rob. 116, Bayley, J. (whose ruling was afterwards confirmed by the court), said: "I know of no such head of insurance law as loss by sale. If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship, he cannot by selling it turn it into a total loss." The case of *Thompson* v. *The Royal Exchange Assurance Company*, 16 East, 214, is directly in point. There, the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured: and it was held that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment: and Lord Ellenborough said: "All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by notice of abandonment, the clause exempting underwriters from particular average may as well be struck out of the policy. We can only look to the time when the loss happened and the goods were landed; and then it was not a total loss, however unprofitable they might afterwards be." *M'Andrews* v. *Vaughan*, Park Ins. 185, 1 Marsh. Ins. 219, is to the same effect. These cases indisputably shew, that, though the

voyage be lost, the loss is not total, the goods remaining in specie. [*Parke*, B., referred to *Naylor* v. *Taylor*, 9 B. & C. 718, 4 M. & R. 526. There, goods were insured at and from L. to any port in the river P.: the policy was effected, and the ship sailed, after notification that those ports were blockaded: the ship was captured by the blockading squadron in the river P., but was rescued by her own crew, and brought back with the goods undamaged to L.; notice of abandonment was given in the interval between intelligence of the capture and of the rescue, but after the rescue; in fact there was no intention to violate the blockade: it was held that the voyage as insured was not illegal, but that the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon was made.] In *M'Andrews* v. *Vaughan*, Park Ins. 185, Marsh. Ins. 149, Lord Kenyon says: "It has invariably been held that the voyage must either have been lost, or the cargo (if it be one of the articles mentioned in the memorandum) must be wholly and actually destroyed, to entitle the insured to recover." The judgment of the court below upon this point is clearly not consistent with the authorities above adverted to.

3. That notice of abandonment was under the circumstances necessary.

3. With respect to the necessity for abandonment, the general principle deducible from an attentive review of the cases appears to be, that, where the assured is at liberty either to treat the loss as an average or a total loss, at his option, there must be a notice of abandonment. It was admitted, indeed, in the argument in the court below, that, had the hides not been sold, there must have been an abandonment; and it was contended that the necessity of a notice of abandonment was obviated by the sale and payment of the proceeds to the agent of the assured before any notice of the loss. *Mullett* v. *Sheddon* and *Cambridge* v. *Anderton*, the cases principally relied on for the

1836.

ROUX v. SALVADOR.

plaintiffs below on this point, are no authorities for the position for which they were cited; for, in both of them, the loss was indisputably total, and consequently there could be no reason for requiring an abandonment: and this is the view which Bayley, J., takes of the subject in *Gardner* v. *Salvador*, 1 M. & Rob. 116, as well as in the case of *Cambridge* v. *Anderton*, as reported in 1 C. & P. 215, n., where that learned judge says: "I take the legal principle to be, that, if, by any perils within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment." In the present case, however, the hides had not ceased to exist as hides. *Doyle* v. *Dallas* and *Robertson* v. *Clarke* were merely cited for the purpose of shewing that the present point was not there taken. *Mitchell* v. *Edie*, 1 T. R. 608, *Allwood* v. *Henckell*, Park Ins. 280, and *Hodgson* v. *Blackiston*, Park Ins. 281, n., are clear authorities in support of the judgment of the court below. In *Mitchell* v. *Edie*, an insurance was made on goods from Jamaica to London. The ship was captured by an American privateer; and, in a few days afterwards, the captors, having stripped her of her stores and part of her rigging, and having taken out some of her hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3 per cent.; and the part of her cargo taken out did not amount to that sum. In consequence of the ship's losing a part of her crew, it became impossible for her to pursue her voyage, and she was obliged to bear away for Charlestown, where she was put into the hands of one Cruden, a part owner, who sold the cargo, but remitted none of the money home. In his books he gave the *underwriters* credit for the amount. At the time of the sale he was in bad circumstances, and afterwards became insolvent. It appeared, however, that the other owners looked to Cruden for two or three years for payment; during all which time no notice of abandon-

ing was given by the insured to the underwriters. In an action on the policy, the defendant paid a sum of money into court, being the amount of the average loss. Two questions were made at the trial—first, whether the plaintiffs were entitled to recover as for a *total loss*. Upon this, Buller, J., who tried the cause, was of opinion, that, as there had been a capture, which for a time had occasioned a total loss, the owners had an option to abandon or not, as they pleased: but, if they had chosen to abandon, they ought to have done it immediately upon receiving intelligence of the loss; and, as they had not done so, but had looked to Cruden as their agent for payment, they had waived their right to abandon, and could only recover as for a partial loss. A verdict having been found for the defendant, Ashhurst, J., upon a motion for a new trial, said: "The general rule is, that, where any part of the property insured has been saved, the insured cannot recover as for a total loss, unless he make his election to abandon, and give reasonable notice to the underwriters of his intention. So, in *Allwood* v. *Henckell*, goods were insured at and from London to Jamaica. The ship was taken by a French privateer within a few leagues of Jamaica. Part of the property insured was taken out of the ship. The captain, boatswain, and all but seven men, were also taken out of her. In a fortnight after, as the captors were proceeding to America, the ship with the remainder of her cargo was retaken by an English frigate, and sent into Antigua; and both ship and cargo were sold there, under a decree of the vice-admiralty court, by a prize agent, who received the proceeds, to be paid over to the concerned, deducting one-eighth for salvage, according to the prize act, 33 Geo. 3, c. 66. The capture and re-capture were entered at Lloyd's on the 15th of February, 1795; but it was not known whither the ship was carried until the 30th March, when a letter was received at Lloyd's, addressed to the owners, freighters, and underwriters,

1836.

ROUX v. SALVADOR.

from the judge of the vice-admiralty court at Antigua, informing them of the arrival of the ship, and of the sale of the ship and cargo under a decree of the court; and desiring to have some agent appointed to remit the proceeds to England. Powers of attorney were sent out in April by the insured, for this purpose, with orders to remit the proceeds to the banking-house of Smith, Payne, & Smith, one of whom was agent to the insured. On the part of the assured, it was contended, that, the property having been absolutely sold and converted into money before the assured knew where the ship was taken to, the loss was total in its nature, and therefore there was no occasion to abandon. Lord Kenyon, who tried the cause, inclined to think that an abandonment was necessary, and that the case was the same as if the property had not been sold, but had remained in specie at Antigua. And there was a verdict for the plaintiff only for an average loss. And in *Hodgson* v. *Blackiston*, a notice of abandonment was held to be necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. These three last-mentioned cases fully establish that the adventure is not so terminated by a sale of that which is saved as to dispense with abandonment. The fact of the notice of the damage and of the sale having been received by the assured at the same time, in no degree alters the position of the parties. The proceeds of the sale were vested in the assured, who was clearly at liberty to retain them and treat the loss as partial; and it is only by abandonment that a loss not in itself an actual total loss can be made constructively total. In *Bell* v. *Nixon*, Holt, 423, a vessel was driven into a port where there was no dock to receive her, and it appeared upon examination and survey that she had suffered so much by sea perils, that it was judged expedient to break her up and sell her for old timber: and it was held that the assured was bound to abandon before he could call upon the

underwriters for a total loss—the ship not being a wreck, but, however maimed and damaged, still existing in specie as a ship. An average loss, and a total loss with benefit of salvage, are wholly different.

Upon the whole, therefore, the judgment of the court below upon the first and third points is borne out by the authorities: but, with respect to the second, their judgment is contrary to principle and contrary to the decided cases.

Reply.—Second point.

Maule, in reply.—The loss that has happened here was clearly a total loss; for, by a peril insured against, it has become impossible for the assured to prosecute to its completion the adventure insured. In these cases, it is the adventure, not the mere merchandize, that forms the subject-matter of the insurance. It was upon this ground that the decision in *Dyson* v. *Rowcroft*, 3 B. & P. 474, proceeded. That case, and *Mullett* v. *Sheddon*, 13 East, 304, go the full length of establishing the doctrine now contended for. In *Anderson* v. *Wallis*, 2 M. & S. 240, the cargo was not of a perishable nature. *M'Andrews* v. *Vaughan*, Park Ins. 185, Marsh. Ins. 149, *Anderson* v. *The Royal Exchange Assurance Company*, 7 East, 38, 3 Smith, 48, *Thompson* v. *The Royal Exchange Assurance Company*, 16 East, 214, and *Glennie* v. *The London Assurance Company*, 2 M. & S. 371, are clearly reconcileable with the argument now urged; for, in all those cases, the loss was partial only; and in each of them the goods either did arrive or might have arrived as goods at their destined port. No doubt, in the present case, had the hides arrived at Bordeaux, in however deteriorated a state, the loss would have been an average loss only. The judgment of the court below upon this point proceeds entirely upon the assumption, which is well warranted by the facts stated in the case, that the hides never could have arrived as hides at Bordeaux, the place to which they were con-

1836.

ROUX v. SALVADOR. Third point.

signed. Then, if the loss were *total* (the distinction between an *actual* and a *constructive total loss* is scarcely intelligible), no abandonment could be necessary: and for this, *Mullett* v. *Sheddon* and *Cambridge* v. *Anderton* are authorities directly inpoint. The necessity for abandonment only exists where the voyage or adventure is capable of being carried on, and the assured chuses to take advantage of the accident that has interrupted it, and declines further to prosecute it.

Cur. adv. vult.

Lord ABINGER, C. B., now delivered the judgment of the court:—This was a writ of error upon a judgment of the court of Common Pleas, in an action on a policy of insurance upon goods by the Roxalane at and from any ports or places in South America, to a port in France or the United Kingdom, with various liberties not material to be mentioned. By a memorandum written at the foot of the policy, the insurance was declared to be on hides shipped at Valparaiso, *free of average, unless the ship should be stranded;* and, in case of average loss, the underwriters were to pay the expense of washing and drying in full. The declaration contains the usual averments, and states that the hides were shipped at Valparaiso; that the vessel set sail with them on board for Bordeaux, a port in France; and that, in the course of the voyage, the hides became lost by the perils of the sea, and never arrived at Bordeaux. The plea is the general issue.

It appears by the record, that the cause was tried, and a special verdict found, which, after stating the facts necessary to support those parts of the declaration upon which no question arises, sets forth the loss, in substance as follows:—That the hides of the value of 1,000*l.* having been shipped in the vessel, she set sail on her voyage; in the progress of which she encountered perils of the sea, and sprung a leak, in consequence of which she was com-

1836.

ROUX v. SALVADOR.

pelled to put into Rio de Janeiro, being the nearest port; that her cargo was taken out and landed, when it was found, as the fact was, that the hides were damaged by the perils of the sea; that, by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation, which could not be checked; that, in consequence of their progressive putrefaction, it was impossible to carry them, or any part of them, in a saleable state, to the termination of the voyage; and that, if it had been attempted to take them to Bordeaux, they would, by reason of the putrefaction, have lost the character of hides before their arrival. The special verdict further states that the hides were in consequence sold at Rio de Janeiro, by order of the French consul there, for the sum of 270*l.*; that they were purchased to be tanned, and were afterwards tanned; that the ship, being repaired, set sail for Bordeaux, and was stranded upon entering the Garonne; and that the earliest intelligence of the damage and sale were received at the same time in a letter from Bordeaux.

The judgment is entered for the defendant: to set aside which judgment this writ of error is brought. The stranding of the vessel upon entering the river Garonne in her passage to Bordeaux, is introduced into the special verdict, with a view to meet the supposed case of a partial loss: and it has been contended, that, the fact of stranding being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion: but the view we take of this case renders it unnecessary to enter into any discussion of the argument, or to pronounce any opinion upon it. It appears from the report of the judgment of the court of Common Pleas upon this case, that the learned judges were of opinion that there was a con-

1. As to the stranding.

Semble, that the stranding of the ship after the goods which are the subject of the insurance are landed, is not such a stranding as to let in a claim for

1836.

ROUX v. SALVADOR.

structive total loss, in case it had been followed by an abandonment to the underwriters; and that their judgment for the defendant was grounded upon the want of such abandonment. It has been urged before us in support of the judgment, first, that there was no total loss; secondly, that, if there were any circumstances which might have amounted to more than an average or partial loss, they were not such as without an abandonment could have been converted into a total loss.

a partial loss on goods declared free from average unless the ship should be stranded.

Upon the first point it has been contended, that, even if these goods had not been excepted from average loss by the memorandum, unless upon the condition of stranding, there would not in this case have been a total loss, and that, à fortiori, being goods so expressly excepted from average loss by the memorandum, they could not become totally lost so long as any part of them remained in specie at the termination of the risk; that the risk terminated when the goods were taken out at Rio de Janeiro, when they were so far from being destroyed by the perils of the sea, that they were actually sold as hides, and were capable of being tanned.

2. That the loss was total.

It appears to us that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such a loss. The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss or the motive for an abandonment; and, in the same view, that interest has been adverted to occasionally by judges, where the conclusions to be drawn from facts upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law: whether a loss be total or partial in its nature, must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be partial or total; it does no more than

Effect of the memorandum.

1836.

ROUX v. SALVADOR.

preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss, or to the principles on which a total loss is to be ascertained. Dismissing this distinction, then, the argument rests upon the position, that if, at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now, this position may be just, if by the "termination of the risk," is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel. Whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed of or can have the control over them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of

What constitutes a total loss.

1836.

ROUX v. SALVADOR.

that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain, that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at *that forced determination of the risk*, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle. Accordingly, in the case of *Hunt* v. *The Royal Exchange Assurance*, 5 M. & S. 47, which was cited by the Attorney-General in support of his argument, the judgment of Lord Ellenborough contains a very important passage, which distinguishes it from the present case. He says: "If, indeed, the cargo had been of a *perishable* nature, this would not have been a case of retardation only, but of destruction of the thing assured:" and, further, he says: "I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November to April, so as to incur any material damage operating a destruction of the thing insured." In the case of *Anderson* v. *Wallis*, 2 M. & S. 240, which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron, which was partially damaged; the assured by their own agent had possession of them; the ship was capable of repair, and might have prosecuted the voyage, and did, in four weeks after the accident, sail upon another voyage: the only pretence for a total loss was the retardation of the voyage; upon which ground, combined with the other circumstances, the court

held the loss not to be total. But it is clear from the judgment of the court, that if, by reason of the perils of the sea, the goods could never have been sent to their destination, the loss would have been held to be total. In like manner, it will be found in the other cases cited upon this part of the argument, that there has always existed one or more other circumstances in combination with that of the goods existing in specie, to induce the judgment that the loss was not total: as, in *Glennie* v. *The Royal Exchange*, 2 M. & S. 371, the rice had arrived at its port of destination, and, though damaged, was delivered to the consignees, and in a saleable state as rice. In *Thompson* v. *The Royal Exchange*, 16 East, 214, the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at Heligoland; and, as stated by Lord Ellenborough, in his judgment, might for any thing that appeared have been forwarded to their port of destination. In *Anderson* v. *The Royal Exchange Assurance Company*, 7 East, 38, the wheat was partly saved, was in the hands of the shipper at Waterford, was kiln-dried, and might have been forwarded, as the rest of the cargo was after the same operation, to its port of destination; but the owner, after dealing with it for some time as his own, abandoned it too late, even if he ever had a right to abandon it at all. In the case before us, the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had commenced, a total destruction of them before their arrival at their port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the as-

1836.

ROUX v. SALVADOR.

sured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods: they could never arrive; and, at the same moment when the intelligence of the loss arrived, all speculation was at an end.

3. That notice of abandonment was not necessary to entitle the assured to recover.

It has, indeed, been strenuously contended before us, that the sale of the hides whilst they remained in specie, rendered abandonment necessary to make the loss total; that the money produced at the sale became vested in the assured; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial; and that, wherever it is in his power to treat the loss as partial, an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not; but his abstaining from his right does not alter the nature of it: and, if it be true that the proceeds of the sale vested in him, they would equally have done so, if, instead of being sold in specie, the hides had actually changed their form, and been sold as glue, or manure, or ashes. The argument, therefore, in effect, resolves itself into this question, whether, when a total loss has taken place before the termination of the risk insured, with a salvage of some portion of the subject insured, which has been converted into money, the insured is bound to abandon before he can recover for a total loss. If any doubt should exist upon this point, it is important that it should be well considered and determined.

The history of our own law furnishes few, if any, illustrations of the subject of abandonment before the time of Lord Mansfield. That great judge was obliged to resort to the aid of foreign codes, and to the opinions of foreign jurists, for the rules and principles which he laid down in the leading cases of *Goss* v. *Withers*, 2 Burr. 683, and *Hamilton* v. *Mendez*, 1 W. Black. 276. But even those

principles are, comparatively speaking, of modern date. The most antient codes of the law maritime when it was considered as part of the law of nations, contain no chapter upon assurances; neither do the earliest municipal codes, nor the earliest treatises upon assurances, make any mention of abandonment. When a policy of assurance was considered in the nature of a wager, without reference to any actual interest possessed by the assured, it was needless to treat of abandonment. The code of Florence, which bears date 1523, contains no allusion to that topic. The decisions of the Rota of Genoa, at the time when that state was most eminent for its naval power and commercial enterprise, have been preserved by Straccha. Amongst them are found many cases of insurance upon sea risks: not one of them turns upon any question of abandonment, or contains any allusion to that subject. The same author has written a very elaborate treatise upon assurances, but is equally silent on the subject of abandonment. He has also preserved in that treatise the form of a policy, bearing date at Ancona, October 20, 1567, which he says was at that time in general use amongst the states of Italy. From the terms of that policy it is difficult to infer any right or duty of abandonment. It contains this clause, "Et si delle mercantie assecurate intervenisse o fosse intervenuto alcun disastro li assecuratorij debbono dare et pagare quelli danari assecurati al detto assecurato fra mesi due dal di che in Ancona ne fosse vera nueva. Et si pretendessero per ragione alcuna dire in contrario non possono esser uditi da corte, guidice, o magistrato alcuno, si prima non averanno pagati effectualmente danari contanti." So that not only two months after the credible news of any disaster was the underwriter bound to pay a total loss; but, if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was, however, to be restored to him in the event of his success. There is also a clause in the policy, by which, if there was

1836.

ROUX v. SALVADOR.

no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution if the ship should afterwards arrive: a provision wholly inconsistent with any notion of abandonment. The same law probably prevailed at that period throughout the states of Italy. But, when assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly, we find in the chapter of assurances in the civil statutes of Genoa in 1610, the disaster upon which the underwriter is bound to pay, is limited and defined to be the incapacity of the ship to proceed within a month after she has been disabled, or the detention of her by force, and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured. In those cases the assured may either abandon the goods and demand the full insurance, or make up the amount of the loss, and demand it from the underwriters, who, if it amount to 50 per cent., shall have their option either to pay that sum and leave the goods to the assured or to pay the whole and take the goods. By the same law, wager policies are prohibited and declared void. Here, it is obvious, that the object of the law was to limit the claim of the assured to a strict indemnity. The same principle will be found in the various codes of the other maritime states of Europe in which abandonment is mentioned; though it must be admitted that the rules they have respectively adopted are very different. In some, abandonment is merely permissive, and limited to very few cases. In others, as in the codes of Rotterdam and Amsterdam, abandonment was imperative even in the case of an absolute total loss. Such seems to have been the law

Insurance a contract of indemnity.

1836.

ROUX v. SALVADOR.

of France, as established by the ordinances of Louis XIV, in 1681. From the words of that code, indeed, it might be thought that they were only intended to prohibit it in all but the specified cases, and not to enforce it as a preliminary condition for recovering an absolute total loss: "Ne pourra le delaissement etre fait qu'en cas de prise, naufrage, bris, échoument, arrêt de prince, ou perte entière des effets assurées: et tous autre dommages ne seront reputés qu'avariès." Emerigon, in his Treatise des Assurances, c. 17, s. 1, remarks, that abandonment presents to the mind the idea of a thing existing in whole or in part, or at least the idea of a doubtful existence; for, it appears absurd to renounce to the assurers a thing of which the absolute loss is already established. Nevertheless, he says, "according to our maritime laws, one may abandon to the underwriters a thing entirely lost, and, however singular it may appear, the law requires the form of an abandonment in the process of an action de delaissement, though it be stated that the goods have absolutely ceased to exist." This apparent inconsistency in the law of France is now removed by the Code Napoleon. Under the title Du Delaissement in the Code de Commerce, there are seven cases enumerated, in which abandonment is permitted, amongst which the "perte entière des effêts assurées" is not to be found. There is, indeed, a power given to abandon in case the loss or damage of the goods insured amounts to three-fourths; but the necessity of making an abandonment in case of the entire loss, seems to be guarded against expressly by the Article 372, which provides, "that the abandonment shall extend to nothing but those effects which are the object of the assurance and of the risk."

But, whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly con-

1836.

ROUX v. SALVADOR.

sidered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know, that, however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases. There may be a capture, which, though primâ facie a total loss, may be followed by a re-capture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as for that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But, if he elects to do this, as the thing insured, or a portion of it, still exists,

Cases where the assured may abandon.

and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value. In all these cases, not only the thing assured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before. In the language of Lord Ellenborough, in the case of *Mellish* v. *Andrews*, 15 East, 13—"It is an established and familiar rule of insurance, that, when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be." Again, in *Mullett* v. *Sheddon*, 13 East, 304, the same learned judge says: "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to to the owner, I should have thought there was much in

1836.

ROUX v. SALVADOR.

the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner: but here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away." In that case, the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner: so that there was a substitution of money for a portion at least of the matter insured. Both these cases are direct authorities that no abandonment is necessary where there is a total loss of the subject-matter insured. To which may be added the cases of *Green* v. *The Royal Exchange Assurance Company*, 6 Taunt. 68, *Idle* v. *The Royal Exchange Assurance Company*, 8 Taunt. 755, *Robertson* v. *Clarke*, 1 Bing. 445, 8 Moore, 662, *Cambridge* v. *Anderton*, 2 B. & C. 697, 4 D. & R. 203: this last is in all points similar to the present, and is an express decision, that, when the subject matter insured has, by a peril of the sea, lost its form and species—where a ship, for example, has become a wreck or a mere congeries of planks, and has been bona fide sold in that state for a sum of money—the assured may recover a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interest of all parties, it is made for the benefit of the party who is to sustain the loss; and, if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the interests of the underwriter may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than or

equal to the sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature. This is the true principle of the case of *Mitchell* v. *Edie*, 1 T. R. 608, which was cited as an authority for the decision of the court of Common Pleas. There, the insurance was upon sugar from Jamaica to London. The ship had been captured by a privateer, deprived of some of her crew and a portion of her stores, then released, and carried by the remainder of the crew into Charlestown, where she arrived on the 18th February, 1782. The report does not state when the intelligence of this event arrived in London; but it is probable that it must have reached the assured before the month of June following. One of the owners of the ship was resident at Charlestown; he took possession of her; and, instead of dispatching her on the original voyage, he sold the cargo of sugar in the month of June, and sent the ship on another voyage. He had been connected with the assured in former adventures. He retained the money in his hands, and came to England in June, 1783. The assured pressed him for payment of the money, but took no step to recover it; he became insolvent the following year: no claim was made upon the underwriter till after this event; and then, after the expiration of three years from the alleged loss of the goods, notice of abandonment was given, and the action brought; upon which the defendant paid into court a sum sufficient to cover a general average, and pleaded the general issue. The court gave judgment against the plaintiff; stating that he had abandoned too late. And it cannot be disputed, that, if he ever had any colour for claiming a total loss, it must have been upon an abandonment before he heard of the sale, as he afterwards gave credit to his agent for the money, and elected

1836.

ROUX v. SALVADOR.

to treat it as his own, till the event of an insolvency, which prevented the underwriter from recovering it. But, in fact, there never was a total loss by a peril of the sea. The sugars were safe at Charlestown, and the sale by the owner of the ship, was not a loss by a peril insured against. The secret of the conduct of the assured may be discovered by a reference to the dates and the circumstances of the time. During the war with America, and especially towards the close of it, the intercourse between that country and the West India Islands was much interrupted; and the price of colonial produce was higher in Charlestown than in London. It was, therefore, probably his interest to give up his claim upon the underwriters, and adopt the sale. If, therefore, the sale of the goods could have been treated as a loss, the conduct of the assured had either deprived him of the right to claim it, or made him liable, if he had the right, to account to the underwriters for the amount of the sale. If, indeed, the court must be supposed to have treated the sale at Charlestown as a loss for which the underwriter was at any time responsible, the case may be an authority for establishing the principle, that, even when a total loss has occurred by a sale of the goods, the assured may, by his own conduct in electing to take the proceeds instead of making his claim upon the underwriter, if he thereby alters the position of the facts, so as to affect the interest of the underwriter, forfeit his claim to recover a total loss. But the case is in no view an authority for the judgment of the court of Common Pleas, which for these reasons we think ought to be reversed, and a verdict entered for the plaintiff for *27l.* 15*s.* 6*d.*, and 40*s.* costs.

Judgment reversed.

IN THE COMMON PLEAS.

HILARY TERM, 7 WILL. IV.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE TINDAL, C. J., PARK, J., VAUGHAN, J., AND BOSANQUET, J. (a).

1837.

Thursday, Jan. 12th.

PRIME *v.* BEESLEY.

In an action on a bill of exchange, by indorsee against *acceptor*, the *drawer* is a competent bail.

ASSUMPSIT on a bill of exchange—indorsee against acceptor. On the bail coming up to justify on the first day of term—

Andrews, Serjeant, opposed their justification, on the ground that one of them was the *drawer* of the bill upon which the action was brought. He submitted that this was clearly an objection to his admissibility; for that the plaintiff would gain no advantage from his responsibility as bail, having his security already as a party to the instrument upon which the action was founded.

W. H. Watson, contra.—The *acceptor* of a bill of exchange is not competent to justify as bail in an action against the *drawer*, because he is the party primarily liable

(a) Mr. Justice BOSANQUET was only in court during the first three days: for the rest of the term, the attendance of the learned Judge was prevented by illness.

1837.

PRIME v. BEESLEY.

on the bill, the latter being only a surety. Here, the affidavit states, in accordance with the rule (Hilary Term, 2 Will. 4, r. 19), that the bail is worth the amount required, over and above what will pay his just debts, and over and above every other sum for which he is now bail. The bill in question is one of his debts. It is true, the plaintiff already has the security of the proposed bail as a party to the bill for which he sues; but the recognizance of bail would impose upon him an absolute liability.

Andrews, Serjeant.—The bill in question is not a debt of which the bail was bound to take notice in the affidavit of sufficiency: it is not a present debt, and non constat that it ever will become a debt due from him. [*Tindal*, C. J.—Unless there be some authority for rejecting the bail, I think he must pass: I must confess I see no objection in principle to his competency. *Bosanquet*, J., referred to Archbold's Practice, 3rd edit., p. 168, where it is said: "It seems to be no objection of itself that the bail is *indorser* of the bill of exchange upon which the action is brought against the defendant as *acceptor*—*Harris* v. *Manley*, 2 B. & P. 526, *Mitchel's Bail*, 1 Chit. Rep. 267 (*b*). But it is an objection that he remains liable on outstanding dishonoured bills—*Barnesdall* v. *Stretton*, 2 Chit. Rep. 79; and the *acceptor* of a dishonoured bill was in a late case—*Anonymous*, 1 Dowl. P. C. 183—held not competent to become bail in an action against the drawers."]

The Court took time to consider, and now—

PARK, J., said that he had consulted the other judges, and the result was that the court thought the bail must be received. He observed, that, in *Barnesdall* v. *Stretton*, which alone had raised any doubt in the minds of the

(*a*) And see Stevens's Bail, 1 Chit. Rep. 305.

court, the bail appeared to have been rejected by reason of his liability as the drawer of dishonoured bills other than the bill upon which the action was brought; and that, although the acceptor of a dishonoured bill was not competent to become bail in an action upon the same bill against the drawer, yet the mere fact of the proposed bail being, as in the present instance, the *drawer* of the bill, was no valid objection to his justifying in an action against the *acceptor*.

1837.

PRIME v. BEESLEY.

Bail allowed.

STANHOPE *v.* FIRMIN and EAVERY.

Thursday, Jan. 12*th.*

Where a party has been improperly made a co-defendant in a cause, and the defence has been conducted in his name without his authority or knowledge, the court will relieve him from execution, where it appears, from the circumstances of the attorney, that he could have no remedy over against him.

THE goods of Stanhope had been distrained by Firmin for rent in arrear, and by him deposited for safe custody in a public house kept by Eavery, who was from home at the time and knew nothing of the proceeding. The rent alleged to be in arrear to Firmin was also claimed to be due to one Clift, at whose instance the goods were replevied. The plaint was removed hither from the county court by one Wright, an attorney who was employed by Firmin in his defence of the replevin suit. Wright accordingly avowed for rent alleged to be in arrear to Firmin, and (notwithstanding the plaintiff in the replevin suit had never authorized his attorney to make Eavery a defendant) made cognizance for Eavery as bailiff of the defendant Firman. A verdict was found for Stanhope, and the goods of Eavery were afterwards taken in execution for 75*l.*, the damages and costs of the replevin suit. Eavery had no knowledge whatever of any of the proceedings, and no notice that he had been made a party to the suit, except by personal service upon him of a notice to appear in the county court. Stanhope was in indigent circumstances; and Firman had absconded. Eavery paid 75*l.* into the hands of the sheriff of Essex, subject (with

1837.

STANHOPE v. FIRMIN.

consent of all parties) to a motion to this court to have it restored to him, on the ground that he had received no notice of the proceedings against him.

Wilde, Serjeant, in Michaelmas Term, accordingly obtained a rule nisi.

Turner, on a subsequent day in the same term, shewed cause.—The application should have addressed itself against Wright, the attorney upon the record, and not against the plaintiff in the action. In *Anonymous*, 1 Salk. 86, Holt, C. J., says: "The course of this court [the court of King's Bench] is, where an attorney takes upon him to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him. In a subsequent case in the same book, p. 88, the court seem to put it upon the sufficiency of the attorney—a very inconvenient course, and one never adopted in modern practice. In *Mudry* v. *Newman*, 1 C. M. & R. 402, where, on a motion for judgment as in case of a nonsuit, it appeared that the action was commenced and carried on in the plaintiff's name without his authority or knowledge, and that the attorney could not be found after diligent inquiry; it was held that that was no answer to the motion, and that the plaintiff's only remedy was against the attorney. In *Thomas* v. *Hewes*, 2 C. & M. 519, in an action of trespass by an occupier against the landlord's agent, the defendant's attorney, employed by the landlord, who also acted as the landlord's attorney in certain actions and suits depending between the landlord and the occupier, consented to an order of Nisi Prius, on the terms that the occupier should give up to the landlord the possession of the farm on which the trespass had been committed, that proceedings should be stayed in all the actions and suits, and that the landlord should pay the taxed costs in the action against the agent,

1837.

STANHOPE v. FIRMIN.

and the further sum of 10*l.* to the occupier. On motion to set aside the order of Nisi Prius, and a rule of court made thereon, upon the ground that the attorney had no authority to bind the landlord by any such arrangement, the court refused to interfere in a summary way. [*Bosanquet*, J.—In *Robson* v. *Eaton*, 1 T. R. 62, it was held, that, if A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is notwithstanding obliged to pay B. again; and that A.'s remedy is against the attorney, though the latter conceived that he was acting at the time under the real authority of B.] In *Filmer* v. *Delber*, 3 Taunt. 486, after an order of reference had been made with the consent of counsel and attorney, the court refused to set it aside on an affidavit by a party, expressly denying his attorney's authority to refer; though the application was made before any step had been taken by the arbitrators, except the appointment of a meeting. So, in *Rex* v. *Addington*, Sayer, 259, upon a motion to make an order of Nisi Prius a rule of court, it was objected that the order was entered into by the attorney without the consent of the party or his counsel: but the court said: "If an attorney exceed his authority, and his client be thereby prejudiced, the attorney is liable to make satisfaction to the client." [*Vaughan*, J.—In all these cases, the individual was the avowed attorney of the party: they were all questions of mere excess.] And in *Williams* v. *Smith et Ux.*, 1 Dowl. P. C., 632, in an action against husband and wife for a debt incurred by the wife dum sola, the court refused, at the instance of the husband, to set aside an appearance entered for both, on the ground that the wife alone had instructed the attorney. In *Wright* v. *Castle*, 3 Mer. 12, it was held that a solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose. All these authorities

1837.

STANHOPE v. FIRMIN.

tend to shew that the courts will, in cases of this sort, leave the party to his remedy against the attorney: and no practical evil appears to have resulted from the adoption of that course. Here, it appears that the summons from the county court was *personally* served upon Eavery: how, then, can he be permitted afterwards to say that the party who acted for him in the suit was not his authorized attorney?

Wilde, Serjeant, in support of his rule.—There was no pretence for making Eavery a defendant at all: the joining him in the replevin suit was the act of the plaintiff; and the only fact that at all embarrasses the case is the personal service of the summons upon Eavery. He, however, swears positively (and his affidavit stands unimpeached) that he was not present when the goods of the plaintiff were deposited in his house, and that he was entirely ignorant of all the proceedings in the suit.

TINDAL, C. J.—It appears to me that we cannot arrive at a just decision in this case without first ascertaining what is the state of Wright's circumstances. In the cases in Salkeld, pp. 86, 88, the interposition of the court is made to depend upon the fact of the solvency or insolvency of the attorney. The second of those cases was as follows—"An attorney appeared, and judgment was entered against his client, and he had no warrant of attorney; and now the question was if the court could set aside the judgment. Et per cur. If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but, if the attorney be not responsible, or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means." And I see no injustice in adopting the same course here; for, the

plaintiff by his own voluntary act made Eavery a defendant, without the smallest evidence to affect him.

1837.

STANHOPE v. FIRMIN.

Turner suggested that it should be referred to the Prothonotary to inquire into and report as to the circumstances under which Wright had defended the action.

TINDAL, C. J.—We are not proposing to call upon Wright for an answer. H is not before us. We put the case simply upon the footing of those cited from Salkeld. Let the rule, therefore, be enlarged until the first day of next term, in order to give the party an opportunity to get an affidavit to satisfy the court as to Wright's circumstances. The enlarged rule may also be served upon Wright.

Rule enlarged accordingly.

Wilde, Serjeant, now produced an affidavit shewing that Wright was in a state of complete insolvency: whereupon the court directed that the rule be made—

Absolute.

ROBSON *v.* FALLOWES.

Friday, Jan. 13th.

ASSUMPSIT on a bill of exchange for 60*l.* drawn by W. & R. Allanson, on the 2nd May, 1835, upon and accepted by the defendant.

To a count on a bill of exchange, the defendant pleaded, amongst other things, that the bill was delivered to the

The defendant pleaded that the said bill of exchange

plaintiff as a security for the payment of differences on illegal contracts or wagers relating to Spanish stocks: the plea contained an averment that the price upon which the differences were to be paid was 67*l.* 7*s.* 6*d.* At the trial there was no evidence as to the exact price stipulated for:—Held, that the allegation as to price was immaterial, and need not be precisely proved.

The court, however, after argument and judgment for the defendant on a motion to enter a *verdict* for the plaintiff on the ground that the averment as to price should have been proved, granted a rule nisi to enter judgment for the plaintiff non obstante veredicto, on the ground that the plea, though proved, was no defence to the action.

1837.

ROBSON v. FALLOWES.

was accepted by him at the request of William Allanson and Robert Allanson, the drawers thereof, for the accommodation of the said William Allanson and Robert Allanson, and not for any consideration whatsoever; that, after the acceptance of the said bill of exchange, the said William Allanson and Robert Allanson, at the request of one Henry Allanson, indorsed the same to the said Henry Allanson, in order that he might apply the same for his own use, and that there was not any consideration whatever for the indorsement by William Allanson and Robert Allanson to the said Henry Allanson; that, afterwards, and before the delivery of the said bill of exchange by the said Henry Allanson to the plaintiff as thereinafter mentioned, to wit, on the 1st May, 1835, certain unlawful wagers and contracts in the nature of wagers and puts and refusals were made and entered into between the said Henry Allanson and the plaintiff, relating to the then future prices and value of certain public stock and public securities, to wit, Spanish Cortes Bonds, and Spanish Scrip, to a large extent, to wit, to the extent of 20,000*l.* thereof, whereby the payment of certain monies by the said Henry Allanson to the plaintiff, or by the plaintiff to the said Henry Allanson, was made to depend on the then future prices of the said Spanish Cortes Bonds and Spanish Scrip; and thereupon it was then unlawfully agreed between the plaintiff and the said Henry Allanson that there should not be any actual or bona fide sale or transfer of the said stock, but that, in case the price thereof should be less than a certain price, to wit, 67*l.* 7*s.* 6*d.* for 100*l.* in the said stock and securities at certain times, to wit, the month of June in the year aforesaid, the said Henry Allanson should pay the plaintiff the difference which might then be between the said respective prices; but that, if the price of the said stock at those times should be more than the said specified price, then the plaintiff should pay the said Henry Allanson such difference or excess: that afterwards, to wit, on &c., the

plaintiff requested the said Henry Allanson to give him, the plaintiff, some security for the balance which might thereafter become due to the plaintiff under and by virtue of the said wagers and contracts; and thereupon, afterwards, and before any of the said times when the price of the said stock was to be taken as aforesaid, to wit, on &c., the said Henry Allanson, being possessed of the said bill of exchange, delivered the same to the plaintiff as a security for the said balance which might become due to him, the plaintiff, under and by virtue of the said illegal wagers and contracts; and the plaintiff then took and received the said bill of exchange as such security as aforesaid: that the plaintiff did not at any time give any consideration whatever for the said bill of exchange, except as aforesaid—verification.

The plaintiff replied that the defendant, of his own wrong, and without the cause by him in his said plea mentioned, broke his said promise &c.

At the trial before Gaselee, J., at the sittings at Guildhall in Easter Term last, a witness who was called on the part of the defendant spoke to one transaction in Spanish Bonds between the plaintiff and Henry Allanson, but was unable to speak positively as to any agreed price upon which the difference was to be paid; if any price were agreed on, he thought it was sixty-two. On the part of the defendant it was contended, that, even if the plea were proved, the contracts therein set out were not illegal—*Wells* v. *Porter*, Ante, Vol. 3, p. 141, 2 New Cases, 722, *Oakley* v. *Rigby*, Ante, Vol. 3, p. 194, 2 New Cases, 732, and therefore the plaintiff was at all events entitled to a verdict. The jury returned a verdict for the defendant; but stated, in answer to a question from the learned judge, that there was but one contract proved, and that there was no evidence before them to enable them to ascertain the price. Leave was reserved to the plaintiff to move to enter a verdict for the amount of the bill and interest.

1837.

ROBSON v. FALLOWES.

F. Kelly, in Easter Term, obtained a rule nisi to enter a verdict accordingly.

Talfourd, Serjeant, and *Cleasby*, shewed cause.—The application in this case should have been for leave to enter up judgment non obstante veredicto, and not to enter a verdict for the plaintiff, who has chosen to take issue upon a plea which he now insists is bad. The evidence offered at the trial fully supported the plea: there was no variance; the price agreed on between the parties to the supposed illegal contract being wholly immaterial. In *May* v. *Brown*, 2 B. & C. 123 (S. C. 4 D. & R. 670), Holroyd, J., referred to a case of *Young* v. *Wright*, 1 Camp. 139, where the declaration stated the bill to have been accepted and indorsed *before* it became due, and the proof was that it was indorsed *after* it became due; and this was held to be no variance, it being immaterial whether the bill was indorsed before or after it became due, and therefore unnecessary to prove the indorsement precisely at the time alleged: and Littledale, J., there said: "In *Peppin* v. *Solomons*, 5 T. R. 496, which was an action on a policy of insurance, the declaration stated that *after* the making of the policy the ship sailed: the evidence was that she sailed *before;* but it was held to be no variance, because it was quite immaterial whether she sailed before or after the making of the policy: so, here, it was quite immaterial whether the money was appropriated whilst the proceedings were in progress against Mr. Merceron or after they had terminated." Here, the price was equally immaterial. A strong confirmation of this view is afforded by the cases arising out of the usury laws. Thus, in *Partridge* v. *Coates*, 1 C. & P. 534, R. & M. 153, it was held, that, in a declaration for usury, the day from which the forbearance is to commence is material, and must be truly stated, although under a videlicet; if no day is stated, it is bad; if a wrong day is laid, it will be a fatal variance. So, in

Fox v. *Keeling*, 2 Ad. & E. 670, 4 N. & M. 523, where usurious interest was alleged to have been taken on the renewal of a bill, and the contract to forbear and the forbearance were alleged to have been from the time of making the agreement for renewal until the second bill became due, but no evidence was given of any precise day on which the transaction took place; it was held that the usury was not sufficiently made out. These, too, it is to be observed, are cases of penal actions. In the present case, the contract is set up by one who is a stranger to it, and who consequently ought not to be held so strictly to the proof of it as if he were a party contracting.

F. Kelly, in support of his rule.—The contract set out in the plea was not proved. The contract alleged was at a certain price; and the jury said that no evidence had been laid before them to enable them to ascertain the price. The plea would have been bad on demurrer had it not set forth the contract upon which the defendant relied. If therefore it was necessary to set out the contract, it was equally necessary that the price, which is the very essence of a contract, should be stated, and, being stated, proved, notwithstanding it be laid under a videlicet. All, in fact, depended upon the price of the stock in this case at the future time in question. The present case is precisely analogous to those of *Partridge* v. *Coates* and *Fox* v. *Keeling*: there, the day was held to be material, because, unless the time appear, it is impossible to ascertain whether or not the bargain is usurious, or the amount of the penalty: so, here, the price not being alleged or proved, there are no means of ascertaining the amount of the difference or of fixing the rights of the contracting parties. That which is in itself material cannot be rendered immaterial by any form of pleading. [*Vaughan*, J.—How can the price be material as between these parties?] Where a party sets up a contract in order to defeat a security legal

1837.

ROBSON v. FALLOWES.

upon the face of it, he must prove it as entered into and as laid in his plea. In declaring upon the contract in question, the allegation of price would have been essential: and more accuracy is required in a plea than in a count. In *Tuck* v. *Tooke*, 4 M. & R. 393, 2 B. & C. 437 (see *Tooke* v. *Tuck*, 12 Moore, 435, 4 Bing. 224), the plea was not confined to a general allegation of fraud and covin, but set forth in detail the circumstances relied on to shew the fraud. There, a plea stating that the plaintiff and the defendant's other creditors agreed to accept a composition and release their debts, that several creditors, relying upon the agreement, executed a release, and that the plaintiff afterwards obtained and accepted the bond in suit for the residue of his debt, by fraud and covin, and without the knowledge or consent and in fraud of the other creditors, was held to be tantamount to an allegation, not of fraud and covin generally, but of fraud and covin effected by the particular means described in the inducement: and, as the facts stated did not shew any stipulation for the giving of the bond contemporaneous with the agreement for the composition, the plaintiff was held entitled to judgment non obstante veredicto, after an issue upon the fraud and covin found in favour of the defendant.

TINDAL, C. J.—It appears to me that the plea in this case has been substantially proved. I agree, that, where a contract is set up as an answer to the action, such contract in its precise terms being material to the defence, though laid under a videlicet, the defendant is not relieved from the precise proof of the contract. The plea in substance states that the bill of exchange declared upon was lodged by the holder with the plaintiff, as a security for any balance that might become due to the plaintiff, under and by virtue of certain illegal wagers and contracts relating to the future price of certain Spanish stocks, entered into between the plaintiff and the party so depositing the bill

of exchange with him. The price upon which the differences were to depend appears to me to be perfectly immaterial to the purpose of this plea. With respect to the cases as to usury, that have been principally relied upon on the part of the plaintiff, it is to be observed, that, generally speaking, the plea of usury (*a*) states the precise terms of the contract: and this is essential, in order that the court may see whether or not the rate of interest taken for the forbearance exceeds the legal rate. The time of forbearance in such cases is the very essence of the illegality in respect of which the party seeks to avoid his own contract. In the present case, however, the price is wholly immaterial. The substance of the plea is simply that the bill of exchange in question was deposited with the plaintiff in pursuance of a contract for time bargains. It seems to me therefore, that, when evidence was given of those time bargains, notwithstanding the price spoken of by the witness differed from that alleged in the plea, the plea was in substance made out. The motion therefore should have been for judgment non obstante veredicto, and not to enter a verdict.

PARK, J.—I am of opinion that there was no variance in this case between the contract as set out in the plea and that proved at the trial. The price was wholly immaterial. In cases of usury, however, the time is most material; for, unless dates were given, it would not appear upon the face of the record whether the transaction were usurious or not.

VAUGHAN, J.—I am of the same opinion. This case wholly differs from the case of a declaration on a contract where time, place, &c., are material; as in *Brown* v. *Sayce*, 4 Taunt. 320, where it was held, that, if a defendant in re-

(*a*) See forms of pleas of usury, Chitty on Pleading, 6th edit., pp. 749, 831, 851.

1837.

ROBSON v. FALLOWES.

plevin avows on a contract for 110*l.* rent, and proves a demise at 15*s.* an acre, amounting to 111*l.*, it is a fatal variance (*b*). Here the substance of the plea is an allegation of an engagement to pay differences whatever the amount may be.

BOSANQUET, J., concurring—

Rule discharged.

Kelly then obtained a rule nisi to enter judgment non obstante veredicto, on the ground that the plea, though proved, afforded no defence to the action. This rule was afterwards, in Trinity Term, 7 Will. 4, made absolute.

(*b*) See Thresh v. Rake, 1 Esp. 53, where it was ruled by Lord Kenyon, that, where an agreement in writing is to be performed on a certain day, and the parties agree to enlarge the time, a declaration on the day stated in the agreement, though the evidence is of a different day, will support the action.

The Governor and Company of THE BANK OF ENGLAND *v.* ANDERSON and Others.

Friday, Jan. 13th.

A copartnership consisting of more than six persons, carrying on the business of bankers within sixty-five miles of London, cannot legally, in the course of such business, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance: such a course of dealing being prohibited by the various statutes now in force relating to the Bank of England.

THE following case was sent by the Master of the Rolls for the opinion of the court of Common Pleas:—

The London and Westminster Bank is a co-partnership consisting of more than six persons, united in covenants, carrying on in London all such parts of the business of banking as are usually carried on by London private bankers. Mr. George Alfred Muskett is a proprietor of shares in the said London and Westminster Bank, and became such by a purchase of shares from a former shareholder. Mr. George Alfred Muskett carries on business as a banker at St. Alban's, which is a town within sixty-five

1837.

The Bank of England v. Anderson.

miles of London, in the county of Hertford, on his own sole account, and is registered at the Stamp Office as the sole person interested in such bank, under the style and firm of the Bank of St. Alban's. The said George Alfred Muskett keeps a banking account with the London and Westminster Bank, and the London and Westminster Bank act as the London agents of the said George Alfred Muskett, and receive and collect for him his London monies, place the same when received to his credit, and hold the same at his disposal, as London bankers usually do for their customers. The Bank of St. Alban's has not any connection whatever with the London and Westminster Bank, except that the London and Westminster Bank act as the London agents of the St. Alban's Bank. On the 21st of February, 1835, one W. J. Robertson applied at the office of the said Bank of St. Alban's for a bill of exchange on London, for 25*l.*, and paid Henry Edwards, the clerk of the said George Alfred Muskett, the sum of 25*l.* for the same; and thereupon the said George Alfred Muskett, by the said Henry Edwards, his clerk, drew upon the said London and Westminster Bank, a bill of exchange, and delivered the same to the said W. J. Robertson. The following is a copy of the said bill:—

"No. 383. Bank of Saint Alban's post bill. 21st of February, 1835.

"To the London and Westminster Bank, Throgmorton Street.

"Twenty-one days after date, pay to the order of W. J. Robertson, Esq., the sum of Twenty Five Pounds, and place the same to account.

"For the Bank of Saint Alban's,

"£25. "Henry Edwards."

"Ent^d. H. E.

The said sum of 25*l.* was received by the said George Alfred Muskett on his own sole account, and for his own use and advantage. The London and Westminster Bank did not pay or compound for the stamp duty on such bill, but the stamp duty on such bill was paid or compounded for by the said George Alfred Muskett.

1837.

The Bank of England v. Anderson.

The said bill was, on the 23rd of February, 1835, presented to the said London and Westminster Bank for acceptance, and the same was accepted by order of the directors thereof, as follows:—

"Accepted,

"At 38, Throgmorton Street, per procuration of the trustees of the London and Westminster Bank,

"J. W. Gilbart, Manager."

At the date of the presentment of the said bill for acceptance, the said London and Westminster Bank had, as such London bankers of the said George Alfred Muskett as aforesaid, monies in their hands to an amount exceeding *25l.*, and the said bill was accepted for and on account of the said London and Westminster Bank.

The question for the opinion of the court was—Whether the acceptance by the London and Westminster Bank of the said bill was lawful; having regard to the provisions of the act 3 & 4 Will. 4, c. 98, and other acts passed and now in force respecting the Bank of England.

The case was argued in Michaelmas Term last.

Argument for the plaintiff.

Maule (Sir *F. Pollock*, *Wilde*, Serjeant, and *Selwyn*, were with him), for the plaintiffs.—The question is, whether a number of persons greater than six, carrying on business as bankers in partnership and within sixty-five miles of London, may lawfully accept against money owing by them, as bankers, to their customers, a bill of exchange at less than six months. On the part of the plaintiffs it is submitted that such an acceptance is a direct violation of the privilege of exclusive banking conferred by various statutes on the Bank of England. The question is one of great importance. The privilege is not one of a private character, granted to the Bank for the private emolument of that body; it has for its object the security of the public against an unsound and artificial currency. By the 3 & 4 Will. 4, c. 98, s. 3, it is enacted, "that any body corporate, or society, or

3 & 4 Will. 4, c. 98, s. 3.

1837.

The Bank of England v. Anderson.

company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty-five miles thereof, provided that such body politic, or corporate, or company, or partnership, do not *borrow, owe, or take up* in England *any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof;*" and the 14th section provides, "that all the powers, authorities, franchises, privileges, and advantages given or recognised by the recited act of the 39 & 40 Geo. 3, as belonging to or enjoyed by the governor and company of the Bank of England, or by any subsequent act or acts of parliament, shall be and the same are hereby declared to be in full force and continued by this act, except so far as the same are altered by this act." In the 39 & 40 Geo. 3, c. 28, s. 15, in order to prevent any doubts arising concerning the privilege or power given by former acts of parliament to the said governor and company, of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the said privilege granted to the governor and company of the Bank of England, it is further enacted and declared, "that it is the true intent and meaning of this act that no other bank shall be erected, established, or allowed by parliament; and that it shall not be lawful for any body politic or corporate whatsoever erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, to *borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof.*" These words, therefore, supposing them to have any meaning at all, must be taken in the sense in which they will operate as a privilege of exclusive banking; they are so construed by the legislature itself. And in all the acts of parliament relating to

1837.

The Bank of England v. Anderson.

the Bank of England, from the 6 Anne, c. 22, down to the present time, similar words occur. The first section of the 3 & 4 Will. 4, c. 98, shews that these privileges were granted to the Bank of England for a very large consideration: it provides, "that, from and after the 1st day of August, 1834, the said governor and company, in consideration of the privileges of exclusive banking given by this act, shall, during the continuance of such privileges, but no longer, deduct from the sums now payable to the said governor and company for the charges of management of the public unredeemed debt, the annual sum of 120,000*l.*, any thing in any act or acts of parliament or agreement to the contrary notwithstanding." It also appears by the recital in the 39 & 40 Geo. 3, c. 28, that the consideration for the then confirmation of the Bank of England's exclusive privilege of banking, was, a loan by them to government of 3,000,000*l.*

5 W. & M., c. 20.

The first act relating to the Bank of England, is the 5 W. & M., c. 20, which was passed in the year 1694, for the purpose of granting certain duties to the crown, and of raising the sum of 1,500,000*l.*, towards carrying on the war with France. The 20th section enacts "that it shall and may be lawful to and for their Majesties, by letters patents under the great seal of England, to limit, direct, and appoint how and in what manner and proportions, and under what rules and directions, the sum of 1,200,000*l.*, of the said sum of 1,500,000*l.*, and the said yearly sum of 100,000*l.*, part of the said yearly sum of 140,000*l.*, and every or any part or proportion thereof, may be assignable or transferable, assigned or transferred, to such person or persons only as shall freely and voluntarily accept of the same, and not otherwise; and to incorporate all and every such subscribers and contributors, their heirs, successors, or assigns, to be one body corporate and politic, by the name of 'The Governor and Company of the Bank of England;' and by the same name of 'The Governor and

1837.

The Bank of England v. Anderson.

Company of the Bank of England' to have perpetual succession, and a common seal; and that they and their successors, by the name aforesaid, shall be able and capable in law to have, purchase, receive, possess, enjoy, and retain to them and their successors, lands, rents, tenements, and hereditaments, of what kind, nature, or quality soever; and also to sell, grant, demise, aliene, or dispose of the same; and, by the same name, to sue and implead, and be sued and impleaded, answer and be answered, in courts of record, or any other place whatsoever, and to do and execute all and singular other matters and things," &c. The 26th section provides "that the corporation so to be made shall not borrow or give security by bill, bond, covenant, or agreement, under their common seal, for any more, further, or other sum or sums of money exceeding in the whole the sum of 1,200,000*l*." The 29th section further provides that all and every bill or bills obligatory and of credit under the seal of the said corporation made or given to any person or persons, shall and may, by indorsement thereon, under the hand of such person or persons, be transferred, and the person to whom they are transferred may sue in his own name.

Section 26.

Section 29.

The act says nothing about any exclusive privilege: but it is probable that those who gave so large a sum of money expected that they should by virtue of that charter have some exclusive privilege; and at that period all the great banks on the continent were connected with their respective governments. The 7 & 8 Will. 3, c. 31, enabled the government to grant a charter to a corporation to be called the "National Land Bank;" a bank similar in effect to the Bank of England. That act provided, that, unless the sum of money therein specified should be subscribed by a certain day, there should be no such corporation: the money not being subscribed by the day mentioned, the design was never carried into execution. But the 8 & 9 Will. 3, c. 20, the title of which is, "An act for making

7 & 8 Will. 3, c. 31—Land Bank act.

8 & 9 Will. 3, c. 20, s. 28.

1837.

The Bank of England v. Anderson.

good the deficiencies of several funds herein mentioned, and for enlarging the capital stock of the Bank of England, and for raising the public credit"—after reciting the 7 & 8 Will. 3, c. 31, provides, in the 28th section, "that, during the continuance of the corporation of the governor and company of the Bank of England, no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament within this kingdom." Here for the first time appears one of the privileges of the Bank of England: and these words, with slight variation, are to be found in all the subsequent statutes, and amount to a parliamentary engagement that no other bank shall be allowed to interfere with its privileges.

6 Anne, c. 22.

The 3 & 4 Anne, c. 9, put promissory notes on the same footing as inland bills of exchange; and the 6 Anne, c. 22, s. 9—after reciting that "whereas, by an act of parliament made in the eighth year of the reign of his late Majesty King William of glorious memory, intituled 'An act for making good the deficiencies of several funds therein mentioned, and for enlarging the capital stock of the Bank of England, and for raising the public credit, it is, amongst other things, enacted, that, during the continuance of the corporation of the governor and company of the Bank of England, no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected, or established, permitted, suffered, countenanced, or allowed by act of parliament, within the kingdom, as in and by the said act more at large may appear; nevertheless, since the passing of the said act, some corporations, by colour of the charters to them granted, and other great numbers of persons by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank,

1837.

The Bank of England v. Anderson.

to the apparent danger of the established credit of the kingdom"—enacts, for preventing of such practice in time to come, and the mischiefs thence to arise, "that, from and after the 29th September, 1708, during the continuance of the governor and company of the Bank of England, it shall not be lawful for any body politic or corporate whatsoever, erected or to be erected, other than the said governor and company of the Bank of England, or for other persons whatsoever united or to be united in covenants or partnership exceeding the number of six persons, in that part of Great Britain called England, *to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof.*" It is clear, therefore, that the 8 & 9 Will. 3, c. 20, was intended to confer upon the Bank of England some exclusive privilege; and that the intention of the legislature having been frustrated, they, in order to the better protection of the Bank, prohibited any body of persons or corporation of more than six "to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof;" and by that prohibition conferred a privilege on the Bank of England. In the 15 Geo. 2, c. 13, s. 5, these words are also understood as restraining other persons from interfering with the privileges of the Bank of England: "to prevent any doubts which may arise concerning the privilege or power given by former acts of parliament to the said governor and company, of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the said privilege granted to the governor and company of the Bank of England as before recited," it is thereby enacted and declared "that it is the true intent and meaning of this act, that no other bank shall be erected, established, or allowed by parliament; and that it shall

15 Geo. 2, c. 13, s. 5.

1837.

The Bank of England v. Anderson.

not be lawful for any body politic or corporate whatsoever, erected or to be erected, or for any other persons whatsoever united or to be united in covenants or partnership exceeding the number of six persons, in that part of Great Britain called England, *to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof,* during the continuance of such said privilege to the said governor and company, who are hereby declared to be and remain a corporation, *with the privilege of exclusive banking* as before recited, subject to redemption on the terms and conditions before mentioned." The intermediate acts are all referred to in the preamble to the 39 & 40 Geo. 3, c. 28; and all speak of the exclusive privilege of the Bank of England: and in the last-mentioned statute the words found in the 6 Anne, c. 22, are again repeated.

7 Geo. 4, c. 46.

The privileges of the Bank of England were somewhat modified by the 7 Geo. 4, c. 46, which, after reciting the 39 & 40 Geo. 3, and the consent of the governor and company to relinquish so much of their exclusive privilege as "prohibits any body politic or corporate, or any number of persons exceeding six, in England, acting in co-partnership, from borrowing, owing, or taking up any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof; provided that such body politic or corporate or persons united in covenants or partnerships exceeding the number of six persons in each co-partnership, shall have the whole of their banking establishments, and carry on their business as bankers, at any place or places in England exceeding the distance of sixty-five miles from London; and that all the individuals composing such corporations or co-partnerships carrying on such business shall be liable," &c., proceeds to enact that "it shall be lawful for any bodies politic or corporate erected for the purposes of banking,

1837.

The Bank of England v. Anderson.

or for any number of persons united in covenants or co-partnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or business of bankers in England in like manner as co-partnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic or corporate or such persons so united as aforesaid to make and issue their bills or notes at any place or places in England exceeding the distance of sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes exceeding the distance of sixty-five miles from London, and not elsewhere; and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued as aforesaid, provided they have not a house of business or establishment as bankers in London or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or co-partnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or co-partnership of which such person shall be a member." [*Tindal*, C. J.—You mean to contend that that statute left the law, within the radius of sixty-five miles round London, precisely as it stood before?] Exactly so. The law enacted by the 6 Anne, c. 22, exists to this day in this part of the kingdom: and the construction put upon the earlier statutes is equally applicable to the now existing statute. The case of *Broughton* v. *The Manchester Water Works Company*, 3 B. & A. 1, is in no respect distinguishable from the present. That was an action brought against the company of proprietors of the Manchester and Salford Water Works, upon a bill of exchange for 200*l.*, accepted by the defendants, and payable three months from the date. It came before the

1837.

The Bank of England v. Anderson.

court on a general demurrer to the declaration. One point taken was, whether the corporation could make a promissory note; another, that this acceptance was a breach of the privilege of the Bank of England. Abbott, C. J., there says: "It is not necessary for me to enter into the general question, whether an action of assumpsit will in any case lie against a body corporate; for, I am of opinion that this case falls within the provisions of the several acts of parliament made for the protection of the Bank of England. The statute by which the Bank was established as a company, contains a provision, 'that it shall not be lawful for any body corporate to borrow, owe, or take up any sum of money on their bills or notes payable at demand or at any less time than six months from the borrowing;' that clause has been incorporated into all the subsequent acts relating to the Bank of England. It seems to me, that, by the fair interpretation of that statute, the words 'owe on a bill of exchange' are applicable to those who are liable as acceptors, for such persons are debtors on the bill. In the case of the bankruptcy of an acceptor, the holder of the bill proves the amount as a debt under the commission, and makes an affidavit that the bankrupt is indebted upon the bill, namely, that he owes the money upon the bill. It seems to me that we should be defeating the object of the statutes if we were to hold that the Manchester Water Works Company could bind themselves by the drawing of bills of exchange or by the issuing of promissory notes. This case is very distinguishable from *Wigan* v. *Fowler*, 1 Stark. N. P. C. 459: there it did not appear on the face of the instrument that the security was made by more than six persons: here it appears that the bill was accepted by a corporation: we are bound, therefore, to give effect to the prohibition in the act of parliament; and to say that the defendants, as a corporation, are not entitled to draw or accept bills of exchange of this description." Bayley, J., says: "This case seems to

me to be clearly within the prohibition of the several acts passed for the protection of the Bank of England." And Holroyd, J., and Best, J., expressed the same opinion. Neither that case nor *Wigan* v. *Fowler* are so strong in favour of the plaintiffs as the present; for, they were not cases in which the Bank of England complained of any violation of their privileges; but cases of actions brought by third persons on bills of exchange, and defended on the ground that the bills were accepted in violation of the exclusive privilege of the Bank of England.

In no case has the Bank itself been under the necessity of interfering. No such thing has to the present time existed as a bank of issue consisting of more than six partners; or, if any such have existed, they have carefully abstained from accepting bills payable in less than six months.

On the part of the defendants, it will be contended that the transaction in question is lawful—that, in the language of the several statutes conferring the privilege, "bills and notes" means *bills under seal* and notes, and does not comprehend bills of exchange—that, supposing bills of exchange to be intended, parties are only prohibited from *borrowing* &c. on their bills of exchange, and that the acceptance of a bill is not a borrowing within the meaning of the act—and that, at all events, it is not a borrowing on the bill of the defendants, the bill being the bill of the drawer and not of the acceptor.

1. It will be contended on the other side that the word "bills," as used in the 6 Anne, c. 22, and in the subsequent acts, means, not bills of exchange, as now in use, but "sealed bills," or "single bills." The plaintiffs are not interested in contending that those instruments are not comprehended within the statute of Anne.

1. As to the meaning of the word "bill," in the 6 Anne, c. 22, and subsequent acts.

The word "bill" is a word of the most general use in every relation of public and private life. Noscitur a sociis: the term "bills or notes payable on demand" must be in-

1837.

The Bank of England v. Anderson.

tended to mean bills having some analogy to notes. Bills and notes are perfectly indistinguishable in point of the legal liabilities arising therefrom. Where bills *under seal* are intended, they are expressly so described: as in the

5 W. & M., c. 20, ss. 26, 29.

5 W. & M., c. 20, ss. 26, 29—"that the corporation so to be made shall not borrow or give security by *bill*, bond, covenant, or agreement, *under their common seal*, for any more, further, or other sum or sums of money exceeding in the whole the sum of 1,200,000:"—"that all and every *bill or bills obligatory and of credit under the seal of the said corporation*, made or given to any person or persons, shall and may, by indorsement thereon under the hand of such person," be transferred, and the person to whom they are transferred may sue in his own name. [*Tindal*, C. J.—These clauses have reference to the case of a corporation, who can only bind themselves under seal.]

In like manner, in the 8 & 9 Will. 3, c. 20, s. 30, there is a restriction of the company borrowing, by bills under seal, more than the whole amount of the capital advanced. There, when bills under seal are intended, the legislature so expresses itself. Sections 21 and 23 speak of bank bills and notes as we speak of them at the present day. The object of conferring the exclusive privilege must have been to restrain the issuing of negotiable instruments, not of bills under seal that were not negotiable instruments. And if the issuing of bills under seal and promissory notes alone were prohibited, one instrument negotiable would be prohibited, and one not negotiable; whilst a third, that is negotiable, viz. a bill of exchange, would be issuable at pleasure. Such a construction would manifestly defeat the very object of the legislature. But the 7 Geo. 4, c. 46, shews plainly that the legislature understood the word "bills" as meaning bills of exchange: section 2 enacts "that nothing in this act contained shall extend or be construed to extend to enable or authorise any such corporation or co-partnership exceeding the number of six

7 Geo. 4, c. 46, s. 2.

1837.

The Bank of England v. Anderson.

persons, so carrying on the trade or business of bankers as aforesaid, either by any member of or person belonging to any such corporation or co-partnership, or by any agent or agents or any other person or persons on behalf of any such corporation or co-partnership, to issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or co-partnership which shall be payable to bearer on demand, or any bank post bill; nor to draw upon any partner or agent or other person or persons who may be resident in London or at any place or places not exceeding the distance of sixty-five miles from London any *bill of exchange* which shall be payable on demand, or which shall be for a less amount than 50*l.* Provided also, that it shall be lawful, notwithstanding anything herein or in the said recited act contained, for any such corporation or co-partnership to draw any *bill of exchange* for any sum of money amounting to the sum of 50*l.* or upwards, payable either in London or elsewhere, at any period after date, or after sight." That is a clear legislative declaration that the word bill in the former part of the section means bill of exchange. The third section provides "that nothing in this act contained shall extend or be construed to extend to enable or authorise any such corporation or co-partnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent, or agents of any such corporation or co-partnership, to borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or co-partnership, payable on demand or at any less time than six months from the borrowing thereof; nor to make or issue any bill or bills of exchange or promissory note or notes of such corporation or co-partnership, contrary to the provisions of the said recited act of the

7 Geo. 4, c. 46, s. 3.

1837.

The Bank of England v. Anderson.

39 & 40 Geo. 3." There is no provision in the 39 & 40 Geo. 3 prohibiting the issuing of bills of exchange, except the provision that banks shall not be at liberty to take up money on *their bills and notes*. That "bills" and "bills of exchange," mean the same thing, is therefore perfectly clear. In the same section it is further provided "that nothing therein contained shall extend or be construed to extend to prevent any such corporation or co-partnership, by any agent or person authorised by them, from discounting in London or elsewhere any bill or *bills of exchange* not drawn by or upon such corporation or co-partnership." The 19th section enacts, "that, if any such corporation or co-partnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, shall, either by any member of or person belonging to any such corporation or co-partnership, or by any agent or agents or any other person or persons on behalf of any such corporation or co-partnership, issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or co-partnership, which shall be payable on demand, or shall draw upon any partner or agent or other person or persons who may be resident in London or at any place or places not exceeding the distance of sixty-five miles from London, any *bill of exchange* which shall be payable on demand, or which shall be for a less amount than 50*l.*; or, if any such corporation or co-partnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent, or agents of any such corporation or co-partnership, shall borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any *bill* or promissory note of any such corporation or co-partnership, payable on demand, or at any less time than six months from the borrowing thereof; or

7 Geo. 4, c. 46, s. 19.

1837.

The Bank of England v. Anderson.

shall make or issue any *bill or bills of exchange* or promissory note or notes of such corporation or co-partnership contrary to the provisions of the said recited act of the 39 & 40 Geo. 3, save as provided by this act, such corporation or co-partnership so offending, or on whose account or behalf any such offence as aforesaid shall be committed, shall for every such offence forfeit the sum of 50*l*." That section throughout treats bills and bills of exchange as synonymous, and speaks of the bills mentioned in the 30 & 40 Geo. 3 as "bills of exchange."

2. Whether the transaction in question was a "borrowing" within the meaning of the acts.

2. The second objection is, that the transaction in question was not such a borrowing as is prohibited by the act of parliament. But in *Wigan* v. *Fowler*, 2 Chit. 128, 1 Stark. N. P. C. 459, Lord Ellenborough said there was a borrowing on the bill, inasmuch as money might be recovered on it: and this mode of borrowing was, in *Broughton* v. *The Manchester Water Works Company*, held to be clearly a violation of the privileges of the Bank of England. In *Perring* v. *Dunston*, Ry. & M. 426, the note upon which the action was brought was the joint and several promissory note of seven persons besides the defendant, and was for 1000*l*., payable at three months to the plaintiffs or order. It was objected that the note was void, being, on the face of it, an infringement of the privilege granted to the Bank of England; and Best, C. J., said, that, if this had been the note of a banking company, it would have been a violation of the privileges of the Bank of England; but, as it did not appear that the note was made by persons united in partnership, and the act does not prohibit persons, joining as sureties, for instance, from giving such a note, the plaintiffs were allowed to recover. But, in *Ex parte Randleson*, Mont. & M'Arth. 86 (which occurred before the relaxation of the Bank privileges), where A., being agent of and also partner in the Leith Banking Company, opened an office at Carlisle, and circulated there promissory notes drawn by the company's

1837.

The Bank of England v. Anderson.

cashier in Scotland, and made payable to the bearer, on demand, at the company's office in Leith, it was held that this was a violation of the statutes passed for the protection of the Bank of England, and that a debt founded on notes so issued could not be proved under a commission of bankrupt. There, the notes were not under seal, and there was no proof of any borrowing. That case, therefore, is a direct authority upon this as well as upon the former objection. *Slark* v. *The Highgate Archway Company*, 5 Taunt. 792, is an express decision of this court, upon deliberation, that a promissory note made by a corporation, though there be no borrowing, and the instrument be not under seal, is within the prohibition. That was an action upon a promissory note for 10,000*l.* made for the accommodation of the payee. The company had, for certain purposes, a power to bind themselves by promissory notes; and the defendants offered to prove that the note was not made for the limited purposes authorised by the act incorporating the company. The only way in which that evidence would be material was, that, if the note was not within the power given to the company, it fell within the prohibition of the Bank acts. The court held that the evidence was material, and granted a new trial; thereby, in effect, holding that such a promissory note, though there was no borrowing, was within the prohibition of the Bank acts. All these cases are authorities to shew that it is not necessary to enter into the consideration of how the bill or note originated, in order to bring it within the prohibition—a prohibition that was meant to be substantial and effective. They also shew, that, wherever there is an owing, there is a borrowing within the meaning of the statutes. If, in order to bring the case within the prohibitory clauses of the Bank acts, it be necessary that there should be an actual loan or advance of gold to the party who issues the bill or note, the prohibition would be perfectly nugatory. The ordinary mode

1837.

The Bank of ENGLAND v. ANDERSON.

in which bankers issue their notes amounts in substance to a borrowing within the acts of parliament; though, in form, rather a lending by the banker. The particular form of words found in the statutes was adopted in preference to the words "make" or "issue," because it was not the making or the issuing, but the liability of the firm upon their notes that would interfere with the privileges of the Bank of England. The object of the legislature evidently was, that there should not be a paper circulation during the existence of the privileges of the Bank of England, upon which the credit of more than six persons united in partnership should be pledged. What is the relation between the holder of a bill of exchange and the acceptor, the party primarily liable upon it? As soon as a party becomes the holder of a bill or note, there is a debt due to him, which debt he forbears during the currency of the instrument. The object of the legislature in passing the acts in question clearly was the conferring some real privileges upon the Bank. It certainly is difficult clearly to define what, in strictness, a borrowing is; but, at all events, it must be conceded, that to lend and to borrow are correlative terms, and that, wherever one man *lends*, another man *borrows*. The 12 Anne, st. 2, c. 16, which makes void securities and contracts tainted with usury, uses no other word than "loan." So that, wherever there may be usury within that statute, there is a loan; and wherever there is a loan, there is a borrowing. If upon the discount of the bill in question, more than five per cent. had been received, that would have been usurious; and, if usurious, there was a loan. [*Tindal*, C. J.—The case finds as a fact that the bill was drawn in respect of money belonging to the drawer in the hands of the drawees.] That statement involves the fact that the defendants *owed* the drawer the money. In common parlance, money that is brought by their customers is said to be *deposited with* bankers; but it is, in fact, so much money

1837.

The Bank of England v. Anderson.

owing by them. In *Sims* v. *Bond*, 5 B. & Ad. 389, Lord Denman, C. J., says: "Sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, *loans* by the customer to the banker;" and, referring to two cases that occurred when Sir William Grant was Master of the Rolls—*Carr* v. *Carr*, 1 Mer. 541, n., and *Devaynes* v. *Noble*, 1 Mer. 568, his lordship adds: "and the plaintiffs, who seek to recover the balance of such an account, must prove that the *loans* were made by them." According to the doctrine laid down in all the cases, the defendants owe the money upon the bill of exchange, and have a right to retain the amount out of the monies deposited with them until the maturity of the bill. The recent statutes must be presumed to have been passed in contemplation of the law being as it had so long been understood to be, and in accordance with the decisions. If the legislature had intended to over-rule the law as laid down in the case of *Broughton* v. *The Manchester Water Works Company*, they would undoubtedly have given some intimation of such their intention.

3. That the acceptance of the defendants was "*their* bill" within the meaning of the statutes.

3. Lastly, it will be contended that the bill in question is not the defendants' bill. The acceptor, however, is the person primarily liable; the other parties to the bill are liable only in the event of the acceptor not paying it, and due notice being given of its dishonor by him. The acceptance, therefore, is essentially the *bill* of the acceptor. The words "their bills" in the several statutes in which they occur, must necessarily mean bills upon which the parties are liable primarily and absolutely.

Sir *John Campbell*, A. G. (*Taddy*, Serjt., Sir *W. Follett*, *Crowder*, and *Shee*, were with him), for the defendants.—If the court should hold that this transaction is illegal, any partnership, whether for banking or other purposes, who may accept a bill of exchange in discharge of a debt, will be guilty of an infraction of the statute,

1837.

The Bank of England v. Anderson.

and the acceptance will be void in the hands of the drawer, or payee, or any person having notice that there are more than six partners in the firm upon which the bill is drawn. The case, therefore, is one of no ordinary importance. A partnership consisting of more than six persons are the agents of Muskett, to collect money for him, and keep it until he gives them an order to pay it for his own purposes. Accordingly, by a bill of exchange, he orders them, twenty-one days after date, to pay 25*l.* of that money to one Robertson. It is admitted that they might lawfully pay the bill if they had never accepted it; and that they might pay upon Muskett's cheque or order: but it is insisted that they may not accept a bill drawn upon them at twenty-one days. The defendants, however, contend that they were at liberty to obey the orders of Muskett as to the disposition of his effects in their hands; that it is wholly immaterial whether the instrument by which he gives the order for that purpose is in the form of a cheque or of a bill of exchange; and that they are not guilty of an infraction of any act of parliament in having accepted the bill in question before it became due. Mercantile firms have from time immemorial been in the habit of accepting bills, though consisting of more than six partners; and it has never been suggested that, in so doing, they have been guilty of any violation of the law. The defendants further contend that the transaction in question was only incidental to the business carried on by them as a bank of deposit; that the law allows a bank of deposit, whether within sixty-five miles of London or beyond; and that that which is incidental to the carrying on of such business is not and never has been prohibited. There would, indeed, be great difficulty in carrying on the business of a bank of deposit, if such a transaction as this were not legal. The private banking companies in London (not consisting of more than six partners,) are banks of deposit. As banks of deposit,

1837.

The Bank of England v. Anderson.

they constantly do that which it is now contended is illegal on the part of these defendants. If the defendants had been acting as a bank of issue, and had circulated negotiable securities in such a form as might in any degree supersede the notes of the Bank of England, so as to form a part of the circulating medium of the country, then they would clearly have been acting illegally, and the Bank of England would have had a right to complain. But the Bank of England can in no degree be prejudiced by anything that forms the subject of this discussion. They do not act as agents of country bankers, or accept bills drawn on them in that character. As an ordinary bank of deposit, the defendants have received monies on account of their customers; and, unless it is competent to them by the usual modes to pass it into the hands or to the order of their customers, their business as a bank of deposit will be materially crippled. It is merely as incident to the character in which they received the money that they have entered into the engagement expressed by their acceptance of the bill in question. The common law knows no distinction between a partnership consisting of six or of any greater number. Is then this transaction, which is in the common course of commercial business, prohibited by any act of parliament? The onus lies upon those who would impeach the legality of the transaction, to shew, by the clear and unequivocal language of the enactments upon which they rely, that it is forbidden. The Bank acts, like canal acts, and all other acts of parliament passed for the furtherance of any commercial enterprise, being in restraint of trade, are to receive the strictest possible interpretation. This case must be decided upon the same principles as if this had been an indictment against these defendants for "borrowing, owing, or taking up any sum of money on their bill or note payable on demand or at a less time than six months from the borrowing thereof;" for, if the act done by them, as stated in the

special case, be prohibited, they have clearly been guilty of an indictable offence.

The plaintiffs mainly rest their case upon the 3 & 4 Will. 4, c. 98. There are two sections in this act of parliament for protecting the privileges of the Bank of England. By the 2nd section, which has not been adverted to by the other side, it is enacted, "That, during the continuance of the said privilege, no body politic or corporate, and no society, or company, or persons united or to be united in covenants or partnerships exceeding six persons, shall make or issue, in London, or within sixty-five miles thereof, any bill of exchange or promissory note or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand." That section is not violated. Had it been the intention of the legislature to extend this provision beyond bills or notes payable on demand, it would have been very easy for them to have so expressed themselves. That clause seems to amount to a legislative declaration of the extent of the monopoly. The 3rd section sets at rest a controversy that existed as to whether or not there could lawfully be a bank of deposit consisting of more than six partners. The most rational construction of the 39 & 40 Geo. 3, c. 28, appears to be, that it intended to prohibit the establishment *by parliament* of any bank to consist of a greater number of partners than six—the legislature engaging to afford them no facilities calculated to clash with or in any way contravene the privileges granted to the Bank of England. By the 15th section of the last-mentioned statute, to prevent any doubts that might arise concerning the privilege or power given by former acts of parliament to the said governor and company, of exclusive banking, and also in regard to the erecting any other bank or banks *by parliament*, or restraining other persons from banking, during the continuance of the said privilege granted to the governor and company of the Bank of England as therein-

3 & 4 Will. 4, c. 98, s. 2.

39 & 40 Geo. 3, c. 28.

1837.

The Bank of England v. Anderson.

before recited, it was enacted and declared, that it was the true and intent and meaning of the act, that no other bank should be erected, established, or allowed *by parliament*; and that it should not be lawful for any body politic or corporate whatsoever erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, *to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof*, during the continuance of such said privilege to the said governor and company. The 3rd section of the 3 & 4 Will. 4, c. 98, declares that "the intention of this act is, that the governor and company of the Bank of England should, during the period stated in the act (subject, nevertheless, to such redemption as is described in this act), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the thirty-ninth and fortieth years of the reign of his Majesty King George 3 aforesaid, as regulated by the said recited act of the seventh year of the reign of his late Majesty King George 4, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking." It is to the words of that 15th section that we must look for the definition of the exclusive privileges of the Bank of England. It will therefore be for the plaintiffs to shew that the transaction in question is a "borrowing, owing, or taking up of money" by the defendants on their bill payable at less than six months from the borrowing thereof.

3 & 4 Will. 4, c. 98, s. 3.

In order to a just construction of these words, it will be material to trace the history of that clause. The same interpretation is to be put upon it in the 39 & 40 Geo. 3, and in the 3 & 4 Will. 4, c. 98, as would have been put upon it in the 6 Anne, c. 22, where it first appeared. If the transaction that is the subject of inquiry this day were legal in the time of Anne, it is legal now.

1837.

The Bank of England v. Anderson.

In the 5 W. & M., c. 20, the act of parliament which established the Bank of England, there is no exclusive privilege of any sort. The adventurers at that time thought they wanted no monopoly; and they never have obtained what may be called a strict monopoly; they have only from time to time sought to guard against particular evils and inconveniences, as those evils and inconveniences arose.

After the passing of the 5 W. & M., c. 20, an act of parliament was passed for establishing a bank to be called the Land Bank. That bank was never established, a sufficient amount of capital not having been subscribed. The proprietors of the Bank of England, however, alarmed at the passing of an act of parliament by which such a formidable rival was to be established, when the 8 & 9 Will. 3, c. 20, was about to be passed, took care to guard against such a danger in future, by bargaining that no other bank should be established by authority of parliament; which was the first enactment giving the Bank of England any exclusive privilege: and with this they were contented until another difficulty presented itself. A Bank called the Million Bank, and another called the Mining Bank, resorted to the expedient of borrowing large sums of money upon their bills under seal; and then, in the 9th section of the 6 Anne, c. 22, the words now relied upon were first introduced. The preamble of that section recites that "Whereas, by an act of parliament made in the eighth year of the reign of his late Majesty King William of glorious memory, it is amongst other things enacted, that, during the continuance of the corporation of the governor and company of the Bank of England, no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed *by act of parliament* within the kingdom, as in and by the said act more at large may appear; nevertheless,

7 & 8 Will. 3, c. 31.

6 Anne, c. 22, s. 9.

1837.

The Bank of England v. Anderson.

since the passing of the said act, some corporations, by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom." The clause then proceeds to enact "That it shall not be lawful for any body politic or corporate whatsoever erected or to be erected, other than the said governor and company of the Bank of England, or for other persons whatsoever united or to be united in covenants or partnership exceeding the number of six persons in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof." Here, then, is the specific evil intended to be redressed—not the acceptance of bills, for that was not then known as a part of the business of banking; but the borrowing of money, and the issuing thereupon of paper that was intended to form a part of the circulating medium, and thereby becoming, as the Million Bank and the Mining Bank were intended to be, banks of issue. Borrowing money, and issuing bills or notes in payment, is what the Bank of England itself did, and does, or is supposed to do. The Bank of England is a bank of issue: it was to prevent the establishment of any other bank of issue consisting of more than six persons, that this clause was introduced; it was not intended to interfere with the trade carried on in London, of more than six persons receiving and collecting the monies of customers, keeping it at their pleasure, and paying it to their order. The enactment in question is next found in the 7 Anne, c. 7, s. 61, without the recital. But still the same meaning must be given to the enactment in the 7 Anne, c. 7, that it had received in the 6 Anne, c. 22; and the recital in the last-mentioned statute

is still to guide us in the construction of the 7 Anne, c. 7. The only safe rule to be observed in construing an act of parliament is, to ascertain what was the evil the legislature were called upon to redress. By the 26th section of the 5 W. & M., c. 20, which established the Bank of England, they were prohibited from "borrowing, or giving security by bill, bond, covenant, or agreement under their common seal, for any more, further, or other sum or sums of money exceeding in the whole the sum of 1,200,000*l.*;" and by the 8 & 9 Will. 3, that permission was further extended: that is, the Bank were permitted to borrow, in order to increase their capital. The object of the 6 Anne, c. 22, was, to prevent other banks from doing that which the Bank of England were authorised to do by the 5 W. & M., c. 20, and by the 8 & 9 Will. 3, c. 20.

3 Geo. 1, c. 8.

The 3 Geo. 1, c. 8, intituled, "An act for redeeming several funds of the governor and company of the Bank of England, pursuant to former provisoes of redemption, and for securing to them several new funds and allowances redeemable by parliament, and for obliging them to advance further sums, not exceeding 2,500,000*l.*, at five per cent.," repeats, in s. 44, the restrictions of the 6 Anne, c. 22.

15 Geo. 2, c. 13, s. 5.

The 15 Geo. 2, c. 13, first introduces the clause in the form in which it is repeated in the 4 Geo. 3, c. 25, s. 13, the 21 Geo. 3, c. 60, s. 12, and in the 39 & 40 Geo. 3, c. 28, s. 15—"And to prevent any doubts that may arise concerning the privilege or power given by former acts of parliament to the said governor and company, of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking, during the continuance of the said privilege granted to the governor and company of the Bank of England as before recited, it is hereby further enacted and declared that it is the true intent and meaning of this act" that no other bank to be erected by parliament, shall "borrow, owe, or take up any sum or sums of money on their bills or notes payable at

1837.

The Bank of England v. Anderson.

demand or at any less time than six months from the borrowing thereof."

It is clear, therefore, that the 3rd section of the 3 & 4 Will. 4, c. 98, confines the Bank of England to the words which were introduced in the 6 Anne, c. 22: and the court are now called upon to say whether or not the legislature, in introducing these words into the 6 Anne, c. 22, meant to interdict the acceptance of a bill of exchange by more than six persons, at a less date than six months, for an antecedent debt. No general monopoly is given to the Bank: but a specific thing is forbidden; and, unless the act complained of is that which is forbidden, the plaintiffs have no case. It would, however, be strange, if the words so introduced in the reign of Queen Anne, could at all apply to such a case as the present; for, it appears from the history of the Bank acts that it was only as an evil was felt that the legislature intended to interpose any restriction upon the common law rights of the subject in carrying on banking concerns; and there is no reason to conjecture that any evil had been felt or was apprehended from such a source. There was an apprehended rivalry between the Bank of England and other banking establishments with reference to the borrowing of money and the issuing of notes; the former, fearing the consequences of that rivalry, induced the legislature to pass a law to free them from it. But they never, as far as it appears, or can reasonably be conjectured, had at that time accepted bills of exchange, nor was it contemplated that that would become a branch of banking business; and therefore they never thought it necessary to call for a legislative provision on the subject. The Bank of England issued either sealed bills or promissory notes in the form of sealed bills. The instruments were both in words nearly the same; but the one was sealed, the other not. Until the 3 & 4 Anne, s. 9, a bill that was not sealed was as little negotiable as a sealed bill: a sealed bill was a better security than a bill not sealed,

because the latter was not an instrument which imported a consideration such as the law would allow an action to be maintained upon. These sealed bills were the common circulating medium of the country. After the 3 & 4 Anne, notes not sealed had an advantage, and were negotiable. But India bonds, which were to all intents and purposes bills, were not negotiable, so as to give a right of action to an indorsee, until within a recent period; and yet they passed readily before they were transferable in point of law. The words of the statute 6 Anne, c. 22, therefore, are clearly insufficient for the purpose to which it is sought to apply them; and neither that nor any of the subsequent statutes makes any distinction between commercial and banking partnerships. If the defendants, carrying on as they do the business of bankers, are forbidden to accept a bill for an existing debt, any commercial or mining company, or any partnership for any other purpose, the number of partners exceeding six, is equally forbidden. If it be said that the restriction applies only to a banking and not to a mere commercial partnership, how are we to distinguish between the two? There is not a West India or an East India house in London that does not act as a bank of deposit. That is not *their* exclusive business. It *is* the exclusive business of the London and Westminster Bank. But, although it be not the exclusive business of the East and West India houses, it is a part of their business, and quoad hoc they are bankers. No distinction can be drawn between a banking and a commercial company: and there being no distinction in the statute between banking and other partnerships, both are at liberty to do that which the defendants in this case are stated to have done, viz. to accept a bill of exchange in discharge of an antecedent debt. A partnership consisting of more than six persons may accept a bill for goods sold and delivered. But if, according to the plaintiffs' reasoning upon the statutes of usury, there would in that case be an owing prohibited

1837.

The Bank of England v. Anderson.

by the Bank acts, this consequence would follow, viz. that the acceptance of a bill for goods sold and delivered would be a direct violation of the acts of parliament. If a mining company consisting of more than six persons have had materials delivered to them for carrying on their concern, and give a bill for the amount payable at less than six months, they infringe the statute; because, according to the plaintiffs' argument, as they owe, there is a loan, and where there is a loan, there is a borrowing. That would lead the court to overturn the cases of *Perring* v. *Dunston* and of *Magor* v. *Hammond*, cited in argument by Bayley, J., in *Harvey* v. *Kay*, 9 B. & C. 363. All the judges, in the case of *Magor* v. *Hammond*, thought that this act of parliament did not apply to prevent a company, however numerous, from accepting a bill, at whatever date, in satisfaction of an antecedent debt.

1. As to the meaning of the term "bills," in the Bank acts.

1. The prohibition in the 6 Anne, c. 22, against borrowing or owing on bills or notes, does not apply to bills of exchange, but only to bills under seal. Bills of exchange were not within the evil that called for redress, and consequently were not within the contemplation of the legislature. At that time, promissory notes were issued, some under seal, some not under seal. The former were called bills, the latter notes. It was to these that the enactment in question was intended to be confined. A bill of exchange, at that time, was not called a bill, any more than a bill of lading or other document now usually so called. When merchants talked of bills, it was presumed they meant securities for money. If by bill was meant bill of exchange, the words "of exchange" were added. In the 8 & 9 Will. 3, the word "bill" is used in the sense in which it is used in the statute of Anne: the 26th section says: "The said corporation shall not borrow or give security by bill, bond, covenant, or agreement under their common seal." There, bill means, not bill of exchange, but single bill under seal. Bond means a bond

8 & 9 Will. 3, c. 20, s. 26.

under penalty. Covenant means an instrument under seal. And, then is added "agreement under their common seal." But, in the 28th section of that statute, where it was intended to speak of bills of exchange, the language employed is—nothing herein contained shall in any wise be construed to hinder the said corporation from dealing in *bills of exchange.*

Legal definition of "bill."

In all the old books which give definitions of legal terms, it will be found, that, about the time at which this statute was passed, "bill," used by itself, in reference to a security for money, did not mean "bill of exchange," but a promissory note under seal, or what was usually called a single bill. Jacob says (Law Dict., BILL): "We are now to see the sense in which it is used among merchants, as a security for money. 'Bill' is also a common engagement for money, given by one man to another; and is sometimes with a penalty, called a penal bill, and sometimes without a penalty, though the latter is most frequently used. By a bill, we ordinarily understand a single bond without a condition. It was formerly all one with an obligation, save only its being called a bill when in English, and an obligation when in Latin. A bill has been defined to be a writing wherein one man is bound to another to pay a sum of money on a day that is future, or *presently on demand,* according to the agreement of the parties at the time it is entered into, and the dealings between them. A bill obligatory written in a party's hand and seal to it, is good. A man says, by his deed, memorandum, that 'I, A. B., have received of C. D. the sum of 20*l.*, which I promise to pay to E. F. In witness whereof, I have hereunto set my seal,' &c. Or if the bill be 'I shall pay to C. D. In witness, &c.' and be sealed; or, if it runs as follows, 'I owe to C. D. 20*l.*, to be paid to him again;' or, 'I, A. B., do bind myself to C. D. that he shall receive 20*l.*' &c.; all these are said to be obligatory." He then gives the form of the bill:—"Know all men by these pre-

1837.

The Bank of England v. Anderson.

sents, that I, A. B., of &c., do owe and am indebted to C. D., of &c., the sum of 50*l.* of lawful money of Great Britain, which I promise to pay unto the said C. D., his executors, administrators, or assigns, at and upon the 1st day of October next ensuing the date of these presents. In witness whereof, I have hereunto set my hand and seal, the —— day of ——, in the year of our Lord, 1764." He afterwards goes on to bills of exchange, and gives a definition of them. This is a direct authority to shew that "bill," standing by itself, in legal language, at that time, did not mean a bill of exchange, but a single bill under seal. "Debt upon a bill of 70*l.*, to be paid upon demand: and, forasmuch as the plaintiff did not shew an actual demand, *Williams*, for the defendant, demurred"—*Capp* v. *Lancaster*, Cro. Eliz. 548. This clearly was an action of debt upon a single bill under seal, and it is described as "debt upon a bill."

The object of the prohibitory enactment appears, not only in the preamble to the 6 Anne, c. 22, but in Anderson's (M'Pherson's) History of Commerce, Vol. 2, p. 606. It is there said, speaking of the Bank of England—"They have hitherto contented themselves with banking only, including therein the dealing in bullion of gold and silver, the discounting of bills of exchange, the advancing of money to the public on the credit of acts of parliament, and the circulating of their own *sealed bills*, which bore interest, though since laid aside; and of their cash notes on demand, bearing no interest; as also the circulating of exchequer bills for the government, on a stated allowance. In all which this happy corporation has proved extremely advantageous to the nation, and has preserved its integrity, and, as far as possible, its credit, even in very perilous times, down to our own days, which has, indeed, been chiefly owing to their members' great care in selecting for their governors and directors only gentlemen of known abilities and integrity, as well as of fortune." In the same

1837.

The Bank of England v. Anderson.

volume, p. 631, the author says: "During the re-coinage of our silver, says Dr. D'Avenant, in the second part of his discourses on the public revenues and trade of England, p. 161, all great dealings were transacted by tallies, *bank bills*, and goldsmiths' notes. Paper credit did not only supply the place of running cash, but greatly multiplied the kingdom's stock. For, tallies and *bank bills* did, to many uses, serve as well, and, to some, better than gold and silver. And this artificial wealth which necessity had introduced did make us less feel the want of that real treasure which the war and our losses at sea had drawn out of the nation." These *bank bills* were not bills of exchange; but the bills that, by the statute of 5 W. & M., c. 20, the Bank was authorised to issue. In Vol. 3 of the same book, p. 22, it is said: "In this year (1704) Queen Anne granted a charter of incorporation to a great number of noblemen and gentlemen of distinction, and eminent citizens of London. The preamble of this charter declares it to be at the humble request of Thomas, Duke of Leeds, Pawlet, Earl of Bolingbroke, Francis, Lord Guildford, Sir Thomas and Sir Humphry Mackworth, for the working and managing of mines and minerals, and smelting, refining, and manufacturing the same, and they to be for ever one body politic, by the name of the Governor and Company of the Mine Adventurers of England. The Duke of Leeds to be governor for life; and to elect a deputy governor and twelve directors, at their general courts, who are also empowered to make bye laws, &c., as customary in other royal charters. Hereupon, in the same year, Sir Humphry Mackworth and William Waller, who had before purchased several leases for terms of years of certain mines in different parts of Wales, did now convey them to this new corporation, on certain conditions mentioned in that conveyance. This company (principally, if not solely, under Sir Humphry Mackworth's direction, who was elected deputy governor for life) went on in a

1837.

The Bank of England v. Anderson.

prosperous manner, adding so many new shares as made the whole number of shares to amount to 6012; and purchasing fresh mines, as well as raising vast quantities of lead and copper, and of litharge, from which they made a great deal of red lead; and from the lead they extracted considerable quantities of silver; and they issued cash notes, which they caused for some time to be circulated throughout a great part of Wales. They also erected themselves into a money bank, and circulated their sealed bills and cash notes for some time in London, till restrained by a clause in an act of parliament in the year 1708, in favour of the Bank of England, elsewhere mentioned." [That act was the 6 Anne, c. 22, the act in which the prohibition was first introduced.] "Sir Humphry Mackworth went on imposing on the proprietors for five years from the date of the charter, by false and sham calculations of their profits, by purchasing lead and litharge from other people's mines, and declaring them to be digged from the company's mines: buying also the silver extracted from other men's lead, and getting it to be coined in the king's mint, as coming from the company's mines; whilst, at the same time, he is not able to go on without fresh artifices and calls on the proprietors now to pay the vast expense of workmen, &c., whose wages were suffered to run in arrear; and, his schemes being too extensive for the company's abilities, he was obliged to stop payment of their sealed bills and cash notes, being, by such wild management, run greatly in debt; whilst, at the same time, he is erecting of charity schools in Wales, with the company's money, for the drawing in of well-meaning people: all which brought on a parliamentary inquiry, as will be seen under the year 1710." Then, after describing the manner in which this mining company had conducted themselves in a variety of other matters, he says (p. 29): "By a statute of the 6th of Queen Anne, c. 22, for continuing several duties therein mentioned upon coffee, &c., and for securing the credit of the Bank of England, &c., it was, amongst many other

1837.

The Bank of England v. Anderson.

points, enacted, that, during the continuance of the governor and company of the Bank of England, it shall not be lawful for any body politic, erected or to be erected, other than the said governor and company of the Bank of England, or for other persons whatsoever united or to be united in covenants or partnership exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof. The reason herein assigned for this enacting clause was, that some corporations, notwithstanding the law of the 8th year of King William III (8 & 9 Will. 3), c. 20, by colour of their charters, and other great number of persons by pretence of deeds or covenants united together, had presumed to borrow great sums of money, and therewith to deal as a bank, to the apparent danger of the established credit of the kingdom. *This clause was principally aimed at the mine adventure company, who, contrary to law, had set up banking, and issued cash notes, as we have already related.*"

The Attorney-General then proposed to read as matter of history tending to illustrate and explain the preamble of the statute 6 Anne, c. 22, extracts from a printed book found in the Bodleian Library, bearing date 1706, and professing to contain the rules and regulations of the mining company referred to in Anderson's History of Commerce; and a document from the Rolls' Chapel, enrolled there as a deed of partnership of the Million Bank, dated in 1698.

On the argument of a special case, the counsel for the defendants, with a view to illustrate and explain the object and intention of a provision in an old act of parliament, proposed to read an extract from a printed book found in the Bodleian Library, dated 1706, and professing to contain the rules and regulations of the Company of Mine Adventurers of England; and also a document from the Rolls' Chapel, inrolled there as a deed of partnership of the Million Bank, dated 1698. The plaintiffs' counsel objecting—the court refused to permit them to be read.

Maule, for the plaintiffs, objected to these documents, as presenting to the court a matter of fact not stated in the case, and about which there might be dispute.

1837.

The Bank of England v. Anderson.

The Attorney-General.—It is competent to the defendants to shew by any reasonable means what is the proper construction of the 6 Anne, c. 22; and what can be more convenient or less questionable evidence than these documents? As to their genuineness there is no dispute. If a passage might be read from the histories of that period, for the purpose of more clearly informing the court as to the mischief against which the statute was aimed, why are not the materials from which those histories must be supposed to have been framed equally admissible for the same purpose? If Tyndale or any other historian of veracity and repute be referred to with a view to the information of the court as to the nature of the circulation of the country about the time of the passing of the statute in question, how can the court shut their eyes to the facts therein stated? The Master of the Rolls has not thought it necessary to state these matters on the face of the case: he trusts to the discretion of this court to ascertain by all legitimate and proper means what is the true construction of the statute.

TINDAL, C. J.—I think, simply upon the score of inconvenience, we cannot receive the evidence tendered. That which is submitted for our consideration is not a matter of general history and notoriety, but a single insulated fact. The inconvenience is, that we could not receive these documents without receiving on the other side other documentary evidence that might in our opinion suffice either to controvert or to lessen the effect that these might have had upon our judgment. Upon that broad ground, I think we cannot receive them. It is the first time that such an attempt has been made: and we all think that the wiser course will be to confine the argument to the particular facts stated in the case.

The documents were accordingly rejected.

1837.

The Bank of England v. Anderson.

The Attorney-General resumed his argument.—Then, from the several acts of parliament already referred to, it appears that the course of proceeding, in the latter end of the reign of William the Third, and in the beginning of the reign of Anne, in such transactions as were intended to be prohibited by the 6 Anne, c. 22, was, the borrowing money, and issuing either sealed bills or promissory notes, which became part of the circulating medium of the country. Government issued Exchequer bills. The Bank issued sealed bills, and also unsealed promissory notes. Bills of exchange were not then known as part of the circulating medium of the country. Exchequer bills are at the present day issued by government. A person puts down a sum of money, and receives an Exchequer bill: the government borrows and owes upon this bill. The Bank of England, in the same manner, issued its bills under seal, receiving loans upon the security of those instruments: and, upon such bills, it borrowed, took up, and owed money. The object of the statute of Anne was to prevent other banks that were not privileged, from borrowing, taking up, and owing in this manner, as the government and the Bank of England did. The transaction now in question is of a totally different description, and is not within the prohibition. The mode of dealing that prevailed then as to Exchequer bills, appears by the 7 & 8 Will. 3, c. 31, which enacts, "that it shall be lawful for his Majesty, or his officers in the receipt of Exchequer, by his Majesty's command and appointment, from time to time, to borrow, or take into the said receipt, any sum or sums of money whatsoever, from any person or persons, natives or foreigners, bodies politic or corporate, that shall be willing to lend or advance the same, either upon the credit of repayment by orders to be registered and paid in course, with interest after the rate of 7*l.* per cent. per annum, or upon the credit of bills, to be made payable on demand, with interest not exceeding the rate of 3*d.* per diem. And in all

7 & 8 Will. 4, c. 31.

1837.

The Bank of England v. Anderson.

cases where any sum or sums of money shall be advanced at the said receipt upon the credit of bills to be made payable upon demand as aforesaid, the person or persons so advancing or paying any such sum or sums of money shall immediately have a bill or bills delivered to him for so much as the principal money so advanced or paid shall amount unto; which bill or bills shall be payable at demand, and shall contain therein an allowance of interest." By the 32nd section of the same statute, the Land Bank were authorized to borrow money; and the form of a bill is given, as follows:—"The governor and company of the National Land Bank do hereby charge the lands entered Libro A., No. 1, with payment of ——*l.* to A. B. &c., for payment whereof they oblige themselves and their successors by these presents, which said bill shall effectually charge the lands." Section 35 provides "that all or any bills to be given out by the said corporation under their common seal, payable to any certain person or the bearer, shall entitle the bearer thereof, whether he or she be native or foreigner, to an action of debt against the said corporation for the recovery of the monies due thereon."

By the 5 W. & M., c. 20, ss. 25, 27, 28, the Bank of England was empowered to issue bills to the amount of 1200,000*l.* The 27th section of that statute mentions bills of exchange: but the 28th section, speaking of bills, has reference, not to bills of exchange, but to bills sealed. These were properly called bank bills, and they are the instruments to which the prohibition in the statute of Anne applies. By the 8 & 9 Will. 3, c. 20, s. 30, the Bank was authorized to borrow a further sum on the security of bills under their common seal—sealed bank bills payable on demand.

12 Anne, c. 11.

By the 12 Anne, c. 11, s. 16, the governor and company of the Bank of England are empowered to contract and agree, in such manner as they shall think fit, with any persons, natives or foreigners, bodies politic or corporate

1837.

The Bank of England v. Anderson.

(with whose abilities they shall be well satisfied), for and concerning the furnishing of monies from time to time by such persons or corporations to the said governor and company:" and, by section 17, it is declared "that such contracts in writing may be made without being stamped &c., and the said governor and company of the Bank of England and their successors have thereby power from time to time to issue out *bank bills under their common seal*, not exceeding, in principal, the amount of the sums of money which shall be called in by them, or paid from time to time, upon such contracts or agreements as aforesaid, over and above the sum which they have already liberty to issue in such bank bill or bills by any former act or acts of parliament in that behalf, any law or statute whatsoever to the contrary notwithstanding." These sections shew the then mode of dealing by the Bank with regard to the borrowing of money, and the issuing of bills under their seal: and this was the mode of dealing for which they sought protection. The 9 & 10 Will. 3, c. 44, s. 89, gives the exact definition of a bank bill. It provides that bills under the seal of the governor and company of the Bank of England, called *bank bills* may be received in payment of certain taxes. Bills of exchange never have been called bank bills. By the 11 Geo. 1, c. 9, intituled, "An act for continuing the several annuities of 88,751*l.* 7*s.* 10½*d.* and 100,000*l.* to the Bank of England" —after a recital (s. 6) that, "of late, divers frauds and deceits have been put upon the governor and company of the Bank of England and other persons, by the altering, forging, and counterfeiting of the bank bills and bank notes of the said governor and company, and by the erasing and altering the said bills and notes, and the indorsements thereupon, and by the tendering in payment, uttering, vending, exchanging, and bartering of such altered, forged, counterfeited, and erased bills and notes, and the indorsements thereupon, to the prejudice of public credit,

9 & 10 Will. 3, c. 44.

11 Geo. 1, c. 9.

1837.

The Bank of England v. Anderson.

and to the great hurt and diminution of trade and commerce"—it is enacted "that, if any person or persons shall alter, forge, or counterfeit any bank bill or bank note made or given out for the payment of any sum of money by or for the said governor and company, or any bank note of any sort whatsoever, or shall erase or alter any such bill or note, or any indorsement thereupon, or shall tender in payment, utter, vend, exchange, or barter, any such altered, forged, or counterfeited bill or note, or any erased or altered bill or note, or the indorsement thereupon, or demand to have the same exchanged for ready money by the said governor and company or their successors, or any other person or persons (knowing such bill or note, or the indorsement thereupon, so tendered or demanded to be exchanged, vended, or bartered, to be altered, forged, counterfeited, or erased), and with intention to defraud the said governor and company, or their successors, or any other person or persons, body politic or corporate," he shall be deemed guilty of felony, &c. Bills of exchange were not within that statute. The forgery of bills of exchange was for the first time made felony by the 2 Geo. 2, c. 25 (*a*), extended by the 15 Geo. 2, c. 13, s. 11. Reliance has been placed on the 7 Geo. 4, c. 46, ss. 3 and 19. By sect. 3 provision is made with respect to those who are privileged to carry on the business of banking at a greater distance than sixty-five miles from London. It prohibits the borrowing, owing, or taking up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or co-partnership (consisting of more than six partners,) payable on demand or at any less time than six months from the borrowing thereof. These are the words of the sta-

(*a*) A promissory note for the payment of one guinea in cash, or Bank of England note, was not a note for the payment of money within the 2 Geo. 2, c. 25. Rex v. Wilcocks, 2 Russ. C. & M. 457.

tute 6 Anne, c. 22: the section then goes on—"nor to make or issue any bill or bills of exchange or promissory note or notes of such corporation or co-partnership contrary to the provisions of the said recited act." If the making or issuing of bills of exchange or promissory notes was not contrary to the provisions of the statute 6 Anne, c. 22, the introduction of these words, whatever the purpose for which they were introduced, cannot extend the provisions of that act; the intention of the 7 Geo. 4, c. 46, being, not to extend, but to restrain the privileges of the Bank of England. The 3rd section of the 3 & 4 Will. 4, c. 98, however, removes all doubt. That section—after reciting the intention of the act to be, that the governor and company of the Bank of England should, during the period stated in that act (subject, nevertheless, to such redemption as therein described), continue to hold and enjoy all the exclusive privileges of banking given by the 39 & 40 Geo. 3, c. 28, as regulated by the 7 Geo. 4, c. 46, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking; and that doubts had arisen as to the construction of the said acts, and as to the extent of such exclusive privilege, and that it was expedient that the same should be removed—declares and enacts that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, might carry on the trade or business of banking in London or within sixty-five miles thereof, "provided that such body politic, &c., do not borrow, owe, or take up in England any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof." The object of this latter provision was, to get rid of the equivocal expressions found in the former acts.

3 & 4 Will. 4, c. 98, s. 3.

For these reasons, it is submitted that the enactment upon which the plaintiffs rest their case does not render illegal the transaction in question; the instrument accept-

1837.

The Bank of England v. Anderson.

ed by the defendants not being a "bill" within the meaning of the legislature, and the acceptance of bills of exchange not being a course of dealing from which the Bank of England had any thing to apprehend.

2. As to whether the transaction was a "borrowing" within the meaning of the acts.

But, should the court be of opinion that the word "bill" in the 6 Anne, c. 22, includes bills of exchange, still the transaction in question is not within the prohibition, for, there has been no *borrowing* by the defendants within the meaning of that act. Upon notes payable on demand, the mere *owing* may be within the prohibition; but, with regard to bills payable after date, the very essence of the transaction that is struck at by the statute is, the *borrowing*. By an Irish Act of the 21 & 22 Geo. 3, intituled "An act for establishing a Bank, by the name of the Governors and Company of the Bank of Ireland," some light is thrown upon this question. That act recites, that it will tend to the advancement of public credit in that kingdom, and to the extension of its trade and commerce, if a Bank, with a public security, shall be established there; and enacts that subscriptions to the amount of 600,000*l.* shall be raised according to the mode in which the Bank of England was established; and that, if the company borrow or give security by bill or note for more than this amount, the subscribers are to be personally answerable. It then enacts, "that, from and after the passing of this act, it shall not be lawful for any body politic or corporate, erected or to be erected, other than the corporation hereby intended to be created and erected into a national bank, or for any other persons whatsoever united or to be united in covenants or partnership, exceeding the number of six persons, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof—under a penalty or forfeiture by such persons, bodies politic or corporate, of treble the sum or sums of money so to be *borrowed* or

21 & 22 Geo. 3, —Irish.

taken up on such bill or bills, note or notes; one moiety thereof to be paid to the informer, and the other to the use of his majesty."

The forfeiture is to be of treble the sum borrowed, that is, given in exchange for the bill or note, not treble the sum specified on the face of the bill. In the case of an indictment for an infraction of the 6 Anne, c. 22, it must be alleged that the bill or note was payable at a less date than six months from the borrowing of the money in exchange for which it is given: to support such an indictment, proof of a *borrowing* would be indispensable. So, in the case of a qui tam action upon the Irish statute, it would be necessary to allege that the bill or note was given for a certain sum, and that a certain sum was borrowed: the action would not be supported by merely putting in the bill, for, the bill would only shew the sum to be paid, and the sum payable might be different from the sum borrowed.

But was there here a borrowing as between Muskett and the London and Westminster Bank? It is impossible upon any sound principle to contend that there was. *Sims* v. *Bond*, 5 B. & Ad. 389, simply decided that a banker is not a bailee. The same had already been held in *Devaynes* v. *Noble*, 1 Mer. 568, and in other cases. The contract into which the banker enters, is, not that he will return the same specific gold or the same bank notes which he receives from his customer, but that he will pay to his order an equal amount. Strictly speaking, it is a contract of lending. But it is never understood that the banker borrows money from the customers who keep accounts with him. In the common sense of mankind, according to which it must be supposed that the legislature speaks, making a deposit is one thing, borrowing is another. A deposit of money with a banker or any other person at interest, is a lending: but a mere deposit of money with him for safe custody, to be at any moment at

1837.

The Bank of England v. Anderson.

the call of the depositor, is not a borrowing either in the sense in which the term would be used by any commercial man, or within the meaning of the legislature. The Bank of England carry on business as private bankers to a very considerable extent. Are *they* borrowers of money? If so, they themselves are guilty of an infraction of the statutes by which they are created and regulated; for, the extent to which they are allowed to borrow money is limited. The 3 & 4 Will. 4, c. 98, s. 8, requires—"That an account of the amount of bullion and securities in the Bank of England belonging to the said governor and company, and of notes in circulation, and of *deposits in the said Bank*, shall be transmitted weekly to the Chancellor of the Exchequer for the time being, and such accounts shall be consolidated at the end of every month; and an average state of the Bank accounts of the preceding three months made from such consolidated accounts as aforesaid, shall be published every month in the next succeeding London Gazette." The expression used is "deposits," not "money *borrowed*." Is, then, the acceptance of a bill a borrowing; or, is a promise to pay a borrowing? When a banker, who has money of his customer's in his hands, accepts a bill, the money, which before was demandable by the customer at his pleasure, is subject to the lien of the drawee who has accepted the bill of the customer; and he has a right to retain that money in his hands as a security for the amount of the bill that he has engaged to pay: in the same manner as if, instead of cash, he had in his hands Exchequer bills or other securities belonging to the customer upon which he would have a lien for the amount of his acceptance. But it cannot be said to amount to a borrowing. The plaintiffs, therefore, must contend that borrowing means merely owing; that the prohibition applies wherever there is a debt of any description owing; and that any forbearance in respect of an existing debt amounts to a borrowing. Such

3 & 4 Will. 4, c. 98, s. 8.

1837.

The Bank of England v. Anderson.

a construction would prevent the payment of an antecedent debt by a bill of exchange accepted by more than six persons in partnership. It would prevent a mining company, or any joint stock company, or any other partnership, whether bankers or not, consisting of more than six individuals, from paying a private debt for goods sold and delivered, clerks' salaries, rent, or the like, by an acceptance at less than six months. In the course of the argument on the part of the plaintiffs, reference has been made to the statutes against usury, under which every forbearance is considered as a fresh loan or borrowing. But that is because such transactions are within the scope of the 12 Anne, st. 2, c. 16, and the other acts relating to the same subject, and are specifically met by the language used by the legislature. No analogy, therefore, can be drawn from the construction that has been put upon those statutes. But suppose a case where no debt exists—an acceptance without valuable consideration: is such a transaction rendered illegal by the 6 Anne, c. 22, s. 9? If it be necessary that there should be a borrowing, in order to bring the transaction in question within that enactment, the defendants are clearly entitled to judgment, on the ground that here there has been no borrowing.

3. Whether the acceptance of the defendants was "*their* bill" within the meaning of the statutes.

3. If the court, however, should be of opinion that the instrument in question is a "bill" within the meaning of the 6 Anne, and that the transaction does in fact constitute a "borrowing;" still the defendants have not borrowed on *their* bill, within the meaning of the statutes. The prohibition applies to the persons issuing the paper. There is no pretence for saying that this bill, according to the common use of language, is issued by the acceptors. The bill must be considered as issued by the drawer. The language of the merchant in drawing a bill, and of the pleader in declaring upon it, always alleges the bill to be the drawer's bill. A bill of exchange is a mere open letter transmitted by the drawer to the drawee for acceptance.

1837.

The Bank of England v. Anderson.

It may be, and commonly is, circulated without acceptance; and therefore it may never in any sense be the bill of the drawee. How, then, can it be said that the acceptor in such a transaction as this is the issuer of the bill?

The class of persons who are aimed at by the 6 Anne, c. 22, are the issuers of the instrument, those who send it into the market. Suppose the case of a parol acceptance, which may still be of foreign bills of exchange, and which might be of inland bills until the passing of Serjeant Onslow's act: can it be said that the drawee, who by parol promises to pay the bill, and thereby becomes the acceptor, borrows, takes up, and owes money upon *his* bill, which bill, perhaps, he never saw, and which bill it is not likely he should see, till the day that it becomes due? Again, suppose an acceptance for honor, or a conditional acceptance: can it be said that a partnership consisting of more than six persons, if they accept a bill for honor, are to be considered as borrowing, owing, or taking up money, within the meaning of the statute? The 7 Geo. 4, c. 46, allows partnerships more than sixty-five miles from London, to be established as banks of issue, under certain conditions, among others, that they shall make a return according to schedule A. Section 4 provides, that, before any such corporation, exceeding the number of six persons, shall begin to issue any bills or notes, or borrow, or owe, or take up any money on their bills or notes, an account or return shall be made out according to the form in the schedule A. This schedule requires a return to be made of the name and places of the bank or banks established by such corporation or copartnership, and the names of the several towns and places where the bills or notes of the said banking corporation or co-partnership are to be issued by the said corporation or co-partnership, or their agent or agents, as the same respectively appear in the books of the said corporation. Would such a bank be liable to the penalties imposed by the 19th section of the act, if, with-

7 Geo. 4, c. 46.

out sending in such an account, they were merely to accept a bill for an antecedent debt, either drawn by a person who kept an account with them, or by a tradesman who had furnished them with goods for the purpose of carrying on their business? The requiring a return of the towns and places where the bills and notes of the said company or partnership *are to be issued*, clearly contemplates the issuing of promissory notes and bills of exchange by the makers, and not the case of a partnership, consisting of more than six persons, accepting bills of exchange in discharge of antecedent debts. A further difficulty presents itself as to the date from which the six months shall begin to run. If the operation of the statute be confined to the maker of a promissory note, or to the drawer of a bill of exchange, the date of the bill as to them is the time when it is issued. But, in the case of an acceptor, from what time are the six months to run? A bill drawn at six months would be legal upon the face of it; and, if presented to the drawees on the day on which the bill is drawn, the acceptance would be legal. Suppose a bill drawn at six months, and accepted by the drawees three days after: would that be lawful or unlawful? If unlawful, a bill at twelve months' date may be rendered unlawful, if accepted by the drawees within the period pointed out by the statute: and to what inconvenience would not that lead? The date of the acceptance never appears upon the bill; the holder seldom knows when it was accepted. If an acceptance under the circumstances last supposed were invalid in the hands of one having knowledge of the fact, in every case the question of knowledge or no knowledge would arise, and the holder of the bill might have his security defeated by evidence on the part of the acceptor that the holder knew that it had been accepted within six months. This would seriously affect the negotiability of bills, and be highly detrimental to the commerce of the country. On the other hand, if an acceptance three days after the

1837.

The Bank of England v. Anderson.

date of the bill or three days before its maturity would suffice to render the instrument legal, the statute would be evaded: it would be easy to antedate the bill.

In construing a penal statute, those who would enforce it are bound to shew the precise description of instruments that come within the scope of the enactment. The arguments above urged tend to shew that the acceptor cannot be the person aimed at by the legislature as the party upon whose bill the borrowing takes place. The absence of all means of arriving at a knowledge of the period at which the borrowing takes place as far as regards him, raises an insuperable bar to the arguments urged for the plaintiffs as to this part of the case.

Although the defendants cannot, in order to fortify their view of the subject, derive any argument from that which has been the usage of private banks and joint stock companies; yet they are at liberty to resort to the various statutes made for the establishment and regulation of the East India Company. By the 9 & 10 Will. 3, c. 44, s. 75, it is enacted, that it shall not be lawful for the said corporation to borrow, owe, or give security for any other or greater sum or sums of money than such as shall be really and bonâ fide expended and laid out in and for the buying of goods, &c. &c. The clause then proceeds—"all which sum or sums of money so to be borrowed for the purpose aforesaid shall be borrowed only on their common seal, and shall not be made payable, or bonâ fide agreed to be paid, at any time less than six months from the time of the borrowing thereof." A similar enactment is to be found in the 7 Geo. 1, st. 1, c. 5, s. 33. Notwithstanding the supposed prohibition in the 6 Anne, c. 22, and the particular prohibitions contained in the statutes last referred to, it is well known that the East India Company accept bills at a less date than six months. This is shewn by the case of *Murray* v. *The East India Company*, 5 B. & Ald. 204. There, the bills upon which the action was brought (accepted by the

9 & 10 Will. 3, c. 44.

company) were at ninety days. If the construction sought by the plaintiffs to be put upon the 6 Anne, c. 22, is to prevail, the East India Company in that case did borrow and owe upon *their* bills payable at a less time than six months from the time of the borrowing; and that would have afforded them a good defence to the action.

The decisions upon this subject are very contradictory, and have not hitherto proceeded upon a very elaborate view of the different acts of parliament upon which the legality of the transaction depends. This, therefore, cannot be said to be res judicata. The two principal cases relied on by the plaintiffs—*Broughton* v. *The Manchester Water Works Company* and *Slark* v. *The Highgate Archway Company*—have been overruled. *Ex parte Randleson*, Mont. & M'A. 86, it is unnecessary to dispute. The issuing the promissory notes in that case was properly held to be an infringement of the Bank privileges, and within the express provision of the statute of Anne. There was clearly a borrowing by the parties upon their notes payable on demand.

Wigan v. *Fowler*, 2 Chit. 128, 1 Stark. 459, is, as far as it goes, an authority in the defendants' favour; the action was held to be maintainable; there was not any transaction of borrowing. One reason given by the court, it is true, was, that the acceptors were not bankers. But the prohibition in the statute is general. *Broughton* v. *The Manchester Water Works Company* was an action of assumpsit on a bill of exchange against a corporation, not created for commercial purposes, and having neither expressly nor impliedly a power to become parties to a promissory note or bill of exchange. That was the argument upon which the defendants in that case mainly relied: all the argument on the point for which the case is now cited, consisted of a reference in six lines to the statute of 6 Anne, c. 22. The court undoubtedly did take the point, and did rely upon it; but, that they were not in a situa-

1837.

The Bank of England v. Anderson.

tion to give a deliberate and solemn opinion upon the construction of the Bank acts, is clear from the error into which Abbott, C. J., fell. He says: "It is not necessary for me to enter into the general question whether an action of assumpsit will, in any case, lie against a body corporate; for, I am of opinion that this case falls within the provisions of the several acts of parliament made for the protection of the Bank of England. The statute by which the Bank was established as a company contains a provision "that it shall not be lawful for any body corporate to borrow, owe, or take up any sum of money on their bills or notes payable on demand or at any less time than six months from the borrowing. Now, that statute (5 W. & M., c. 20,) does not contain any such provision; neither does the 8 & 9 Will. 3, c. 20: no such provision is introduced till the 6 Anne, c. 22. And it was material that he should not have been misled in this respect; for, he seems to have thought that the Bank, in its original formation, was fenced round with these securities; and that the object of the legislature was, from the first, to give it a complete monopoly: whereas, neither by the first nor by the second act is any such monopoly conferred; and the exclusive privilege is only given for the purpose of meeting a particular grievance. His lordship further observes "that clause has been incorporated into all the subsequent acts relating to the Bank of England. It seems to me that, by the fair interpretation of that statute, the words 'owe on a bill of exchange,' are applicable to those who are liable as acceptors, for such persons are debtors on the bill." There are no such words in the statute as 'owe on a bill of exchange;' the words are, 'owe on their bill or note.' Bayley, J., says; "The object of the legislature was not to prevent other corporations from borrowing money on promissory notes or bills of exchange, but only to prevent them taking up money on bills or notes of such description as might come in competition with those of the Bank of

England. That corporation issues notes payable on demand, and discounts bills at short dates. The accepting of bills, or the issuing of promissory notes, payable at such short dates, by other corporations, would infringe upon the exclusive privileges given to the Bank of England by the legislature." The Bank of England has no *exclusive* privilege with regard to discounting bills. That case was not open to a writ of error; for, the ground first relied on in the argument there was amply sufficient to support the judgment, quite independently of the ground upon which the judges seem to have placed their greatest reliance. In *Slark* v. *The Highgate Archway Company*, 5 Taunt. 792, nothing was determined, nor does this question appear to have been discussed: two points are suggested by the reporter, the one with a semble, the other with a quære; but neither of them would touch the present case, even if they had actually been decided. In *Perring* v. *Dunston*, R. & M. 426, the note was signed by seven persons, and it was objected that it was void, being upon the face of it an infringement of the privileges of the Bank of England. But, Best, C. J., said; "I agree with the opinion given by my Lord Ellenborough in *Wigan* v. *Fowler*, and I think, that, taking all the Bank acts together, the object of the legislature was, to give protection against rival bankers only. It does not appear that this note has any relation to persons in partnership for the purposes of banking. The case of *Broughton* v. *The Manchester Water Works* goes upon the fact of the defendants being a corporation. I think the note valid." And the plaintiffs recovered a verdict. The objection was renewed before the full court, and over-ruled. That case, therefore, is an express over-ruling of *Broughton* v. *The Manchester Water Works Company*. In *Harvey* v. *Kay*, 9 B. & C. 356, it was contended by counsel, that, "the bill being accepted by more than six persons, it is, at all events, void by the several acts made for the protection of the Bank of England,"

1837.

The Bank of England v. Anderson.

and *Broughton* v. *The Manchester Water Works Company* was referred to: whereupon Bayley, J., said: "In *Magor* v. *Hammond* (*a*), all the judges were of opinion that those acts did not prevent more than six persons from paying their debts by their acceptance, but merely prevented more than six persons carrying on a banking concern." The special verdict in *Magor* v. *Hammond* sets out bills of exchange, payable at two month after date, and drawn by the Cornwall and Devonshire Mining Company; and the finding of the jury that more than six persons acted as shareholders and directors of the said projected company at the time the bills were drawn and accepted; and that the plaintiffs had notice thereof when they became the holders. The 3 & 4 Will. 4, c. 98, passed since; and it cannot be presumed that the legislature were ignorant of this judicial declaration of all the judges. *Dickenson* v. *Valpy*, was a question of partnership; but this question was there agitated, and the court gave a distinct opinion upon it. This does not appear from the report in 10 B. & C. 128: but it does appear from the short-hand writer's notes, which are confirmed by Crowder, who was of counsel in the cause. From these it appears that the principal question was, whether the defendant Valpy was to be considered a partner in the company, and liable to be sued as such. The action was brought by the plaintiff as indorsee of the following instrument:—

"Two months after date, pay to the order of Mr. Thomas Teague 300*l.*, value received as advised.

"For the Cornwall and Devonshire Mining Company.
"Rowland Wilks."

There was a verdict for the plaintiff. Sir James Scarlett, who moved for a new trial, objected, among other things, that the company consisted of a greater number of per-

(*a*) Magor v. Hammond was argued somewhere about the year 1829, before the twelve judges, at the Hall in Serjeant's Inn. *Crowder* argued at great length on one side. No judgment was ever pronounced; nor has the case been reported.

sons than six, and therefore the note was an infringement of the Bank acts. Upon shewing cause, C. F. Williams, for the plaintiff, upon this point, said: "I arrive at the fourth objection of Sir James Scarlett, which is, that we could not recover on this bill, it being a violation of the Bank acts. I understood that, in *Harvey* v. *Kay*, in this very concern, Lord Tenterden had suggested that all the judges were of opinion that this did not come within the Bank acts. [Lord Tenterden.—A bill of exchange in payment of a debt, cannot be said to be so.] If I am right in supposing that Lord Tenterden has delivered the opinion of the court, I shall not touch on that. [Bayley, J. —Otherwise, any mercantile partnership consisting of more than a limited number of persons, cannot issue a bill of exchange. Lord Tenterden.—That will not be further pressed. Bayley, J.—That is assumed in the last Bank act, 7 Geo. 4, c. 46."] Sir James Scarlett then observed: "I feel that so strongly that I should be very loth to press on that. I do not understand any of the decisions to counteract what Lord Tenterden now states." And Parke, J., added: "The prohibition applies only to banking companies."

It may, therefore, fairly be assumed to be settled that the acceptance of a bill of exchange in satisfaction of an existing debt is not an infringement of the exclusive privileges enjoyed by the Bank of England: in order to have that effect, the security must have been given with intent to borrow upon it, and at the time of borrowing. In the present case, the acceptance was given, not with a view to the borrowing of money by the defendants, but simply in payment of a debt: it is therefore no infringement of the Bank acts. The point has never been solemnly raised or solemnly decided; but the weight of the authorities, such as they are, is in the defendants' favour: and, if this were res nova, there is no principle upon which the transaction now in question could be held to be a violation of the law.

1837.

The Bank of England v. Anderson.

Maule, in reply.—The only principle upon which this case can be decided in favour of the London and Westminster Bank, is one that would be utterly destructive of public credit as well as of the exclusive privilege of the Bank of England—a privilege granted for the maintenance of public credit, and, according to Anderson, extremely beneficial to commerce. If the transaction in question be held to be lawful, it will inundate the country with paper money, and so frustrate the very end for which the Bank of England was first established.

The Bank acts have from the time of Anne to the present hour uniformly been received by the commercial world in the sense for which the plaintiffs now contend. The substance of the prohibition is, that the credit of more than six persons shall not be pledged upon an instrument, either legally or practically negotiable at a less date than six months. All bills were meant to be included within the prohibition that are within the mischief intended to be remedied by the act.

In *Perring* v. *Dunston*, the verdict was taken for the plaintiffs by consent for one seventh of the debt. And, giving it all the authority that may be due to it, that case cannot be said to have over-ruled *Broughton* v. *The Manchester Waterworks Company*, which was decided on demurrer. The mistake into which Lord Tenterden is said to have fallen, is clearly an error of the reporters. In *Magor* v. *Hammond*, there was no decision, but a mere intimation of opinion: and in *Dickinson* v. *Valpy* Sir James Scarlett forbore to press a point upon which a question might be raised, when he had a clear case upon other grounds. Having an answer which went directly to the merits of the transaction, viz. that it was attempted to bind the defendant by the acts of a person whom he had never authorised, he did not rely upon the Bank acts on a point as to which some decisions were adverse or doubtful. The impression of Bayley, J., in that case, seems to

have been in accord with the opinions expressed by Lord Ellenborough in *Wigan* v. *Fowler*, and by Best, C. J., in *Perring* v. *Dunstan:* and there seems to be good reason for the view they take. But those opinions had reference, not to the case of a banking partnership like this, but to that of a mere trading firm.

In *Slark* v. *The Highgate Archway Company*, the court, in holding the rejected evidence material, affirmed the legal proposition that the promissory note, if made for the accommodation of the payee, would be a violation of the exclusive privilege of the Bank of England. Where the court, after argument, grants a new trial on the ground of the improper rejection of evidence, that is a solemn adjudication of every legal point necessary to establish the validity of the evidence. There is manifestly a great distinction between a banking and a mere commercial partnership. None of the great East or West India houses consist of more than six partners. If they did, they could not lawfully accept bills of exchange drawn at less than six months.

First point.

It would be trifling with the language as well as with the spirit of the enactment, to hold it to apply only to the parchment sealed bills that appear to have been in use in the time of Queen Anne. The statute uses the term "bill" in a general and comprehensive manner. It is clear from the 7 Geo. 4, c. 46, ss. 2, 3, and 19, that the legislature considered bills of exchange to fall within the meaning both of the 6 Anne, c. 22, and the 39 & 40 Geo. 3, c. 28. Wherever in the older statutes, bills under seal were meant, the legislature have carefully so expressed themselves. The word "bill" is used in these statutes in its larger and more comprehensive signification—referring to any obligation (short of a deed) the object of which is the securing a sum of money. A more narrow construtcion would altogether defeat the intention of the statutes. Of what use to the Bank would be the exclusive privilege of

1837.

The Bank of ENGLAND v. ANDERSON.

issuing sealed bills, if other bodies might lawfully issue promissory notes, payable on demand, not under seal? The passage cited from Jacob's Law Dictionary seems to shew that the word "bill" was, at the time of which he speaks, used much in the same sense as it is at the present day. In Comyns's Digest, tit. *Merchant*, (F. 1.) it is said: "Payment by a merchant shall be made in money or by bill." What does that import? That a bill is any written instrument used for making mercantile payments. Again, "Payment by bill is by bill of debt, bill of credit, or bill of exchange. A bill of debt, or bill obligatory, is, when a merchant by his writing acknowledges himself in debt, in such and such a sum, to be paid at such a day, and subscribes it at a day and place certain; but the time and place certain, like an attestation, is not the essence of the matter. Sometimes a seal is put to it. But such *bill* binds *by the custom of merchants*, without seal, witness, or delivery." (F. 2.) For this is cited Malyne, an authority of considerable value in mercantile matters. It is evident from Anderson's History of Commerce (which, however, is a book of no great authority), Vol. 3, p. 800, that bills under seal soon fell into desuetude. By sections 21 and 23 of the 8 & 9 Will. 3, c. 20, it is provided that four-fifths of the additional capital to be advanced by the persons to be incorporated, shall be paid in tallies, and the other fifth in bank bills or bank notes, which have so much money bona fide resting due thereupon: not speaking of the bills as bills under seal: and the 36th section shews clearly that some instruments other than sealed bills or notes, that were also called "bills," were then coming into use. From the case of *Rex* v. *Bigg*, 3 P. Wms. 419, it is clear that bank bills were not at that time under seal. Exchequer bills never formed any part of the circulating medium of this country. The 14th section of the act for the establishment of the Bank of Ireland, 21 & 22 Geo. 3, is framed precisely in the words conferring the privilege on the

Bank of England. The object being to bestow upon the Bank of Ireland a protection against a practice then in use; not a protection against the issue of bills *under seal*, which had been obsolete for a century.

Second point.

2. It is said, that, in order to bring a party within the prohibition, there must be a lending, borrowing, or owing of money at the time of giving the bill or note, and that the giving a bill in satisfaction of an antecedent debt will not have that effect. And, in order to shew that the borrowing was the thing prohibited, the preamble of the statute 6 Anne, c. 22, is relied on, which recites the borrowing as that which produced the mischief. The prohibition in the enacting part of the statute, however, is directed against the borrowing, owing, or taking up of money: these words do not refer merely to the borrowing mentioned in the first part of the preamble, but generally to the dealing as a bank which was the mischief pointed at by the act, and thereby intended to be restrained. With respect to notes payable upon demand, it is admitted, on the part of the defendants, there need not be a borrowing; it is sufficient if there be an owing. According to that argument, there are two classes of instruments in this prohibition, with two rules of prohibition applicable to them; the effect of which would be to make the word *owe* apply to notes payable on demand only. But the words can be read in no other grammatical way than this —they shall not borrow, owe, or take up on their bills or notes payable at demand or at less than six months— taking the whole of the verbs to apply to the whole of the substantives. The word "owe" is not an immaterial word; it was intended to have some meaning. According to the opinion of Abbott, C. J., in *Broughton* v. *The Manchester Waterworks Company*, the acceptor is properly said to *owe* on a bill of exchange. And whenever money is owed upon the security of a bill or note, there has been also, within the meaning of the statute, a bor-

1837.

The Bank of England v. Anderson.

rowing. If a *loan* be necessary to bring the case within the prohibition, there has been a loan here; for, in *Sims* v. *Bond*, it was held that the money of a customer deposited in the hands of a banker, constitutes in fact a loan to the banker. [*Tindal*, C. J.—The common banker's pass-book has *debtor* and *creditor* sides.] The only object of the 3 & Will. 4, c. 98, s. 8, is, that the Bank shall give an account of what their liabilities and their assets are. It is said, if the Bank of England be deemed to borrow money from persons who keep accounts with them, they are violating the statute which prohibits them from raising more than a certain amount. It is true, their power of borrowing upon securities under seal is limited: but the debt upon notes is expressly excluded.

Third point.

3. With respect to the argument that the bill is not the bill of the acceptor—The acceptor is the party primarily liable to pay the bill: he having accepted it, the bill is properly said to be *his* bill: if not accepted, the bill is the bill of the drawer; when indorsed it becomes the bill of the indorsee. In the case of an acceptance for honor, the bill is more especially the bill of the acceptor.

The acceptances by the East India Company have no bearing on this case. That company was created by the 9 & 10 Will. 3, c. 44, for the purpose of trade, by the authority of parliament, and probably would have, as incidental to that, the power of accepting and drawing bills. That act confers upon the East India Company certain rights; but it also contains provisions for the protection of the Bank of England. The company certainly accept bills at less than six months' date, but they are not very likely to interfere with the privileges of the Bank of England. It is impossible for the court to shut their eyes to the consequences of a decision calculated to break in upon the exclusive privileges of the Bank.

TINDAL, C. J.—This case has been argued very ela-

borately [the argument occupied nearly the whole of three days] and very learnedly on both sides: and, as it involves principles of such vast importance, we must take time to look into the several statutes and authorities to which our attention has been called.

Cur. adv. vult.

Tindal, C. J., now delivered the opinion of the court:—This case, which has been sent to us by the Master of the Rolls, involves in its determination results of such general importance that we have thought it right, not merely to certify our opinion to his Honor in the ordinary way, but to state publicly the grounds and reasons on which such opinion has been formed.

The question is, whether a co-partnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from London, can, by law, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance. And we are of opinion, regard being had to the various statutes which relate to the Bank of England, that such an acceptance is not a lawful acceptance.

In thus stating the question, we purposely insert, as one of its terms, that the acceptance is given in the course of the defendants' trade or business of bankers; first, because such appears to us to be the necessary character of the transaction described in the case; and, secondly, because we are unwilling to embarrass the general question with the consideration of one of much less importance, viz. whether an acceptance given by more than six persons in partnership, but not as bankers, or by more than six persons in partnership as bankers, but given in payment of their private debt, as for goods sold, or salaries of clerks, or rent, or the like, would or would not fall within the restriction to which we shall afterwards more particularly

Quære whether an acceptance given by more than six persons in partnership, but not as bankers, or by more than six persons in partnership as bankers, but given in payment of their private debt, as for goods sold, or salaries of clerks, or rent, or the like, would or would not fall within the restriction in the Bank acts as to the accept-

1837.

The Bank of England v. Anderson.

advert, and which we consider, under the several statutes, to be still in force.

ance by companies consisting of more than six individuals of bills of exchange at a less date than six months?

The question above stated depends for its answer upon the construction to be put upon the statute 3 & 4 Will. 4, c. 98, the statute which is at present in force and operation; and the particular clause of the statute which bears upon it is the 3rd section, by which it is enacted, "that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty-five miles thereof: provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in England any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof." These prohibitory words are found originally in the 9th section of the statute 6 Anne, c. 22, by which statute any direct restriction was for the first time imposed upon the rights of the public in favour of the Bank of England. And, in order to determine the proper construction which is to be put on the words employed by the legislature in the statute of his present majesty, it will be advisable to ascertain, in the first place, the intention of the legislature when the same restriction was originally imposed, and afterwards to consider whether any of the subsequent statutes passed from time to time for the renewal or confirmation of the privileges of the Bank of England, either throw any light upon the original intention of the legislature as to the extent of the restriction, or have by their own operation enlarged such extent.

The Bank of England was first established by the 5 W. & M. c. 20, which, by s. 19, gave power to their Majesties, by letters patent, to incorporate the subscribers and contributors to the sum of money therein mentioned, by the name of the Governor and Company of the Bank of England. By two subsequent sections, the 26th and

27th, the corporation is prohibited from buying or selling any goods, wares, or merchandizes, but not from dealing in bills of exchange, or buying or selling bullion, gold, or silver, or goods deposited with them. This statute, however, does not confer any exclusive privilege whatever on the Bank beyond that given by the 28th section, namely, that of making their bills obligatory and of credit under the seal of the corporation, transferable toties quoties by indorsement under the hand of the holder, and allowing the assignee to sue upon the same in his own name: but the statute itself is altogether silent as to the intention of the legislature, whether the Bank thereby empowered to be created should be a bank of circulation and issue, or merely a bank of deposit. Under the powers of this statute, the governor and company of the Bank of England were shortly afterwards made a body corporate by royal charter; and by the statute 8 & 9 Will. 3, c. 20, which is the next in succession relating to the Bank, the stock of the company is allowed to be augmented and increased; and the first direct privilege is conferred upon the company, by enacting in s. 28, that, during the continuance of the corporation, "no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament, within this kingdom;" which words are explained by the later statute 15 Geo. 2, c. 13, s. 5, to intend "that no other bank shall be erected, established, or allowed by parliament." From this time, no extension whatever of the privileges of the Bank took place until the passing of the statute 6 Anne, c. 22, above referred to; when, in an act of parliament, the title to which embraces a variety of subjects of legislation having no relation to each other, and states, amongst the rest, that of "An act for securing the credit of the Bank of England," the prohibition above referred to, upon the proper construction of which the

1837.

The Bank of England v. Anderson.

present inquiry mainly turns, is first created by the legislature. In the interval, however, between the incorporation of the Bank of England and the statute of Anne, that is, between the years 1694 and 1707, it is certain that the Bank had begun and continued to act as a bank of circulation and issue, and probably to a very considerable extent. This appears evident, as well from the language of the recital in the 36th section of the statute 8 & 9 Will. 3, c. 20, above referred to, as from the enacting words of that section. The 36th section recites "that divers frauds and cheats had been put upon the governor and company of the Bank of England, by the altering, forging, and counterfeiting of the bank bills and bank notes of the said governor and company, and by the rasing and altering indorsements thereupon, to the great decay of credit;" after which the clause proceeds, "that, for redressing the same for the future, it is enacted, that the forging and counterfeiting the common seal of the corporation of the governor and company, *or of any sealed bank bill* made or given out in the name of the said governor and company, for the payment of any sum of money, or of any bank note of any sort whatsoever, signed for the said governor and company of the Bank of England, or the altering or rasing any indorsement on any bank bill or note of any sort, shall be, and is hereby adjudged to be, felony without benefit of clergy." This clause affords an inference which seems undeniable, namely, that, in 1697, when that statute was passed, the Bank of England was in the habit of issuing bank bills sealed, and bank notes signed, so largely, that the protection of such bills and notes from forgery *was essential to the preservation and security of the public credit.*

In this state of things the statute of Anne was passed. The clause in question begins by reciting the enactments of the before-mentioned statute, 8 & 9 Will. 3, c. 20, by which it was provided, that, during the continuance of the

corporation of the governor and company of the Bank of England, no other bank, or any other corporation, society, fellowship, company, or constitution, in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed by act of parliament, within the kingdom; nevertheless, that, since the passing of the said act, some corporations, by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, *contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom:* and, after this recital, the statute proceeds to provide the remedy in the terms following, viz., "that it shall not be lawful for any body politic or corporate whatsoever, erected or to be erected, other than the said governor and company of the Bank of England, or for any other persons whatsoever, united or to be united in covenants or partnerships exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand or at any less time than six months from the borrowing thereof."

The great grievance, therefore, to which the statute of Anne intended to apply a remedy, was that of other corporations and large numbers of persons, united in partnership contrary to the intent of the statute of Will 3, "presuming to deal as a bank;" that is, as a bank of circulation and issue; for, merely dealing as a bank of deposit could scarcely "affect the credit of the Bank of England," the securing of which credit is the object mentioned in the title of the act; still less could it operate "to the danger of the established credit of the kingdom," which is the effect of such dealing as described in the recital to the said section.

The grievance intended to be remedied by the 6 Anne, c. 22.

Such, then, being the grievance felt and described in

The remedy.

1837.

The Bank of England v. Anderson.

the statute, the remedy which the legislature would à priori be expected to apply, is, some remedy co-extensive with the mischief itself; some enactment which, if it did not in terms prevent persons united in a co-partnership of more than a given number from "dealing as a bank of circulation" altogether, would at least impose such restraints and regulations upon the mode of dealing as a bank, as would prevent them from coming into competition with the dealing of the Bank of England, by laying a sufficient check upon the issue of negotiable bills or notes having the security of a large body of co-partners and made payable on demand or at a very short time after their issue. Whatever was the extent of the restriction thus originally imposed by the statute of Anne, it is found to be repeated in all the subsequent statutes passed from time to time for the renewal or confirmation of the privileges of the Bank of England, if not in words precisely the same to the very letter, yet in words bearing precisely the same meaning; and it is for the last time inserted in the statute above referred to, the 3 & 4 Will. 4, c. 98, as the proviso or condition upon the observance of which "any society or partnership, although consisting of more than six persons, might carry on the trade or business of banking in London or within sixty-five miles thereof." And the question immediately before is, whether this restriction is framed in such terms as to comprise within its limits and extent the transaction stated in the case. Upon the part of the defendants, it is contended that the facts stated in the case do not bring the transaction within the restriction of the statutes. And, as the three principal objections which have been urged are grounded upon the language used in the statute of Anne, we will consider them in their order.

In the first place, it is objected that the statute of Anne, using the term "bills" simply and without any addition, must be construed to intend "bills sealed, or ob-

1837.

The Bank of England v. Anderson.

ligatory," or, as they are commonly termed, single bills; and that, by reference to the two former acts passed in the preceding reign for the establishment of the Bank of England, bills of exchange cannot be held to be included within the word "bills," without any addition. In the second place, it is objected, that no case can fall within the meaning of the restriction, unless where the transaction is such as to import "a borrowing" on the part of the co-partnership; which, as it is argued, cannot be said to exist on the present occasion. And, thirdly, it is objected, that, even if the defendants can be held to have "borrowed" by accepting the bill, yet that they have not borrowed "on their bill," which is required by the statute.

With respect to each of these objections, it may be advisable, in order to discover the views of the legislature, to consider, first, the statute of Anne, taken by itself, and next, some of the subsequent acts passed in pari materiâ, in order to discover whether they throw any light upon the language originally employed in the first statute, or make any legislative alteration therein by subsequent enactment.

1. As to the meaning of the term "bills" in the statute 6 Anne, c. 22, and subsequent acts.

And, with respect to the first objection, we think there must be considerable doubt as to the soundness of the construction contended for by the defendants, when it is observed that the statute of Anne is not speaking in the clause under consideration of bills or notes of the governor and company of the Bank of England, but of bills or notes of any other bodies politic or corporate, and of persons united in co-partnership to a greater number than six. It is therefore no necessary inference, that by "bills" the statute meant such bills only as the Bank of England were in the habit of issuing: but all other bills might equally be included. Again, the restriction relates to bills of persons in co-partnership: but, as such persons can have no common seal, it would seem, to say the least of

1837.

The Bank of England v. Anderson.

it, very improbable that the statute could have intended bills sealed with the several seals of a co-partnership consisting of persons exceeding the number of six to an indefinite extent; sealed bills by an indefinite number of private partners never having been heard of in the course of of trade, certainly never as a medium of circulation—the very necessity of proof of so many separate sealings (the law of England not allowing any one partner to seal for others under an implied authority) rendering the recovery on such instruments almost impracticable. Again, neither the bills sealed by other bodies corporate or by co-partners were negotiable instruments—not being transferable by indorsement under the hand of the holder; the power given for transferring such sealed bills by indorsement being limited by the statute to the case of sealed bills of the Bank of England. To construe the restriction, therefore, as limited to sealed bills of co-partners, would be to legislate against a danger which could not by possibility exist. Again, the manifest object of the restriction was, to prevent the circulation of negotiable paper of whatever description it might be, which might come into competition with circulating paper of the Bank of England. To prohibit, therefore, the issue of such bills only as corresponded in precise form with those adopted by the Bank, and to permit the issue of bills of any other form, would have fallen short altogether of the object professed by the restriction: it would have conferred no advantage whatever on the Bank, nor any security to public credit. We therefore think, looking at the statute of Anne alone, the sounder construction is, that, in using the general expression, "bills or notes," it was the object of the legislature to comprise within the restriction all negotiable instruments which could fall, in common understanding at that time, within either of those denominations. And again, when it is further considered, that, within three years before the passing of the statute of Anne, promissory

1837.

The Bank of England v. Anderson.

notes and inland bills of exchange had been put by the legislature on the same footing, we think the expression of bills and notes may with more propriety of construction be held to comprise bills of exchange, than be confined to bills under seal.

But, in order to arrive at the meaning of the prohibition in the present statute, 3 & 4 Will. 4, c. 98, which is borrowed from the statute 6 Anne, c. 22, the acts passed by the legislature in pari materiâ between the two may be referred to with great advantage. The question is, whether the expression "bills or notes" found in both those acts, is confined to bills sealed and promissory notes. The affirmative of that proposition is contended for by the defendants, on the ground of the language employed by the legislature in the two earliest Bank acts. Do the subsequent acts bear out or impugn that construction? The statute which appears to us to throw the greatest light on the question, is, the 15 Geo. 2, c. 13. The 5th section of that act, after reciting that it is passed "to prevent any doubts that may arise concerning the privilege or power given by former acts to the governor and company, of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the said privilege," proceeds to declare that it is the true intent and meaning of this act, "that no other bank shall be erected, established, or allowed by parliament; and that it shall not be lawful for any body politic &c." to borrow, owe, or take up any sum or sums of money on "their bills or notes" payable, &c., as stated in the statute of Anne. Now, in the 12th section of the very same statute, the word "bill" requires manifestly the construction of a bill not under the seal of the company, but an ordinary bill of exchange. It is an enactment, that, "if any officer or servant of the company, intrusted with any note, bill, dividend-warrant, bond, deed, or any security, money, or

15 Geo. 2, c. 13.

1837.

The Bank of England v. Anderson.

other effects belonging to the said company, shall embezzle any such note, bill, dividend-warrant, bond, deed, &c., such person shall be guilty of felony. It appears to us that the words note and bill, when occurring without any addition in the 12th section, must be held to mean not bills sealed only, but bills of exchange; and, if so, the same expression "bills or notes" occurring in the 5th section, which is expressly stated to have been passed to prevent any doubts as to the privileges given by former acts, must receive the same construction.

7 Geo. 4, c. 46.

The statute next in order of time to which reference may be made for the purpose before adverted to, is that of 7 Geo. 4, c. 46. By that statute it is recited that the Bank of England had consented to relinquish so much of their exclusive privilege of banking as prohibits more than six persons in England acting in co-partnership, from borrowing, owing, &c., at a greater distance than sixty-five miles from London, upon certain conditions therein specified. One of these conditions is stated in the 3rd section to be this—that such co-partnerships do not borrow, owe, or take up in London, or within sixty-five miles thereof, any sum of money on any bill or promissory note of such co-partnership, payable on demand or at any less time than six months from the borrowing thereof, "nor make or issue any bill or bills of exchange or promissory note of such co-partnership, contrary to the provisions of the recited act of the 39 & 40 Geo. 3." These last words plainly shew that bills of exchange are within some of the provisions of the 39 & 40 Geo. 3. But, upon reference to that statute, no words are found to comprehend them, except the expression so often adverted to, "bills or notes." The very same section further provides, that it shall not extend to prevent such co-partnership (that is, a copartnership carrying on their business as bankers beyond sixty-five miles from London), by any agent, from discounting in London "any bill of exchange

1837.

The Bank of England v. Anderson.

not drawn by or upon such co-partnership, or by or upon any person in their behalf." Now, the manifest object of the introduction of this negative was, to let it appear clearly to the world that the circulation in London of bills of exchange at short dates, upon the credit of such country co-partnerships, either as drawers or acceptors, was excluded from the benefit of the proviso. And the anxiety of the legislature upon this subject is further manifested by the provision contained in the 2nd section, that such country co-partnerships shall not draw upon any person resident in London any bill of exchange which shall be payable on demand *or* for less than *50l.* With such an object in view, it can scarcely be conceived to be within the intention of the legislature, that a bill of exchange at twenty-one days for *25l.* (as is the present case, or, as it might be, at three days for *5l.*, for the argument is precisely the same,) might be accepted by a banking co-partnership in London, and circulated in London, upon their credit, without any violation of the prohibition in the same statute to owe money on such bill.

Lastly, to take into consideration the recent statute 3 & 4 Will. 4, c. 98: the 3rd section of that statute—after reciting the intention of the act to be, that the governor and company of the Bank of England should, during the period stated in that act (subject, nevertheless, to such redemption as was described therein), continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the 39 & 40 Geo. 3, c. 28, as regulated by the said recited act of the 7 Geo. 4, c. 46, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking, and that doubts had arisen as to the construction of the said acts, and as to the extent of such exclusive privilege, and that it was expedient that the same should be removed—declares and enacts that any body politic or corporate, or society, or company, or partnership, although consisting of more

3 & 4 Will. 4, c. 98.

1837.

The Bank of England v. Anderson.

than six persons, might carry on the trade or business of banking in London, or within sixty-five miles thereof, "provided that such body politic, &c., do not borrow, owe, or take up in England any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof." Here is a modern act of parliament in which the expression of "bills or notes" is found to occur. Suppose this statute had stood alone, could any one at this time of day hesitate in construing it to intend "bills of exchange and promissory notes?" And, when we find the expression in the section which recites that doubts had arisen as to the construction of the former acts, and as to the extent of the exclusive privilege, we think it amounts to a legislative declaration that the words in the former statutes are to be construed in the sense which the same words import at the time when the new statute speaks.

2. The acceptance by a banker of a bill drawn upon him by his customer, at a distant day, for the payment of the drawer's money in the hands of the drawee, is a *borrowing* or owing of money by the banker within the meaning of the Bank acts.

But the second objection grounded upon the words of the original statute, and upon which the principal reliance appears to have been placed in the course of the argument, is, that the transaction stated in the case cannot be held to be "a borrowing;" that the acceptance by a banker of a bill drawn upon him by his customer at a distant day for the payment of his, the customer's, money placed in the banker's hands, is no loan to the banker, and, consequently, no borrowing by him; but merely a mode of payment to the customer of what is his own. But it appears to us, in the first place, that the acceptance of the bill, under the circumstances stated in the case, is to be considered as a borrowing in point of law. By taking his acceptance, the customer consents that his money shall remain in his banker's hands until the bill becomes due; he has no power or right, after receiving the acceptance, to change his mind, cancel the acceptance, and compel the banker to pay his money on demand. The drawing and accepting the bill forms a contract be-

1837.

The Bank of England v. Anderson.

tween the drawer and acceptor, which can only be rescinded by the mutual consent of both: for, what would be the condition of the banker who may have lent the money of his customer on the faith of the forbearance given, if the law were otherwise? The relative position, therefore, of the customer and the banker seems undistinguishable as to its legal consequences in any material respect from that of lender and borrower. But "borrow" is not the only word employed by the statute. The words used are, "provided they do not borrow, owe, or take up." Now, we consider these latter words as put in apposition with the word borrow, for the purpose of expounding the meaning in which the legislature intended to employ the first term; for, if "owe and take up" had been used in a sense essentially different from "borrow," the frame of the proviso must be held to be incomplete. There is, upon that supposition, no length of time expressed in the statute, from "the owing or taking up," short of which time, the bill or note cannot legally be drawn; for, the proviso prohibits such bills or notes only as are payable on demand or at a less time than six months "from the borrowing thereof." The meaning of of the term "borrow" must therefore be taken to have been considered by the legislature as substantially the same as that of the terms "owe or take up" with which it is put in juxta-position. And that the transaction amounts to "an owing" of money by the banker to his customer, can admit of no doubt. Whenever the drawee of a bill of exchange accepts it, he becomes a debtor to the holder of the bill to the amount of the sum specified in the bill, and the holder gives credit to the acceptor to that amount until the maturity of the bill. The relation of debtor and creditor thus created by the acceptance of the bill appears to be considered by the legislature as equivalent to an actual borrowing of the money owing on the one hand and credited on the other. That such was the

1837.

The Bank of England v. Anderson.

opinion of the court of King's Bench, appears from the case of *Broughton* v. *The Manchester Waterworks Company*, 3 B. & A. 1, which was much referred to in the course of the argument; in giving judgment on which case, each of the learned judges states, in effect, "that the acceptance made the company debtors, and to owe upon their bills."

3. The acceptance by a banker of a bill drawn by a customer on account of money of the latter in the hands of the former, is a borrowing of money on the acceptor's bill within the meaning of the Bank acts.

It was objected, in the third place, that, even if there was a borrowing by the defendants, yet they have not borrowed "on their bill;" and that the statute prohibits only a borrowing "on their bills or notes." But we are of opinion, that, if the bankers are to be held borrowers, and the acceptance of the bill drawn upon them is the security they give for the debt, they do, in common parlance, borrow on their bill, when they borrow on their acceptance. The acceptor is as much a party to the bill as the drawer: indeed he is the person primarily liable on the bill as soon as he becomes a party to it by giving his acceptance. But, after all, the expression, both in the statute of Anne and in the subsequent acts, of "their bills or notes," may only have been used to distinguish them from the bills or notes of the Bank of England. And, if the interpretation of the statute could be held otherwise, what an easy mode would be opened for evading the prohibition of the statute? It was insisted upon in the course of the argument, that the holding the acceptance stated in the case to be illegal, would invalidate the security of all transactions in bills of exchange, where the acceptors consisted of a partnership of more than six persons; for that no man could tell, by looking at the bill, at what period the time of borrowing took place, or whether the bill had six months to run from such time or not. The first answer to this objection is, that the difficulty does not occur in the present or in any case where the bill is drawn at less than six months from its date; for, in such case, every person must know that the bill

1837.

The Bank of England v. Anderson.

had been accepted within six months from the borrowing. Secondly, that, although, if a bill should be drawn at a longer period than six months, and accepted within six months next before the time of its maturity, the transaction would be a violation of the provisions of the statute, and all persons who were privy to it would be prevented from enforcing the acceptance; still such violation of the prohibition of the statute would not affect a bonâ fide holder without notice. If bills of exchange so accepted cannot lawfully be issued, the danger of their being employed as circulating paper cannot be great: but, on the other hand, if bills at very short dates may be lawfully accepted, it is obvious that a paper circulation might be created by such bills, almost equivalent to a circulation of promissory notes payable on demand.

Notwithstanding, therefore, the objections that have been urged on the part of the defendants to the construction of the clauses above adverted to, we are of opinion that the acceptance stated in the case falls within the prohibition contained in the statute of 3 & 4 Will. 4, c. 98. And we feel no doubt that it falls within the mischief which the statute of 6 Anne, c. 22, and all the subsequent acts, intended to provide against, viz., the permitting any other body corporate, or any partnership consisting of a larger number of persons, to enter into competition with the Bank of England by the issue of notes or bills either payable on demand or at short periods from their issue. This construction of the prohibitory clause gives a real benefit and protection to the Bank of England: and that something real and substantial was intended to be given by the legislature, on the one hand, and was, on the other hand, thought and believed by the Bank of England to be given to them, is evident from the constant repetition in all subsequent acts, in the same words, of the identical provision contained in the statute of Anne; for, if not a real privilege, why was it continued to be inserted? The

1837.

The Bank of England v. Anderson.

construction contended for by the defendants, that it must be confined to bills under the seals of the co-partners, gives in reality no benefit or protection at all at the present period, if it ever could have given any. But it is not only to be considered that such was the sense in which parliament and the Bank of England, who may be considered as the contracting parties, understood the provision; but such also has been the general understanding of all, at the time the first act passed, and from thence to the statute of 3 & 4 Will. 4, c. 98. For, no instance can be pointed out, until the present, in which a banking co-partnership consisting of more than six in number have been found, in the course of their dealing as bankers, to accept bills of exchange payable at a less interval than six months from their acceptance. And, if no other argument were brought forward, we attribute great weight to the maxim of law, contemporanea expositio fortissima est in lege.

Upon the whole, therefore, we shall certify to the Master of the Rolls the opinion of the judges who heard the argument, to the effect above stated.

The following certificate was afterwards sent:—

"We have heard this case argued by counsel, and are of opinion that the acceptance by the London and Westminster Bank of the bill mentioned in the case, was not lawful, regard being had to the provisions of the act 3 & 4 Will. 4, c. 98, and the other acts passed and now in force respecting the Bank of England.

"N. C. TINDAL.
"S. GASELEE.
"J. VAUGHAN.
"J. B. BOSANQUET."

1837.

DEVAS and Others, Assignees of BOWRING & GARROD, Bankrupts, *v.* VENABLES and Others.

Saturday, Jan. 14*th.*

In order to the validity of a payment to a bankrupt under the 6 Geo. 4, c. 16, s. 82, the *sale* in respect of which the payment is made must be a bona fide sale in the usual course of business.

THIS was an action of trover brought by the assignees of Bowring & Garrod, bankrupts, to recover the value of certain goods alleged to be the property of the bankrupts. The defendants pleaded several pleas: the fifth plea stated, amongst other things, that the defendants, without notice of any act of bankruptcy committed by Bowring & Garrod, and before the issuing of any fiat against them, bought the goods in question of those persons, and really and bonâ fide paid them for the same; that the plaintiffs had not repaid them the amount; wherefore the defendants claimed a lien upon the goods. The plaintiffs in their replication took issue upon the bona fides of the transaction.

The cause was tried before Tindal, C. J., at the sittings in London after the last term. The plaintiffs, it appeared, sought to recover the value of several parcels of goods that had been purchased by the defendants from Bowring & Garrod some before and others after the act of bankruptcy. The circumstances under which the first parcel was sold were detailed by a witness named Kirby, who had been a clerk in the employ of the bankrupts, as follow:—Bowring & Garrod, being in insolvent circumstances, and with a view to defraud their creditors, purchased unusually large quantities of goods, and procured Kirby to remove them by night from their place of business to his, Kirby's, lodgings, whither Garrod went and gave directions for the sale of the goods. In pursuance of his instructions, Kirby agreed with one of the defendants for the sale of the parcel of goods in question to them at a price greatly inadequate to their real value, and much below the prime cost. The transaction being conducted in secrecy, and no seller's name appearing, Kirby, upon

1837.

DEVAS v. VENABLES.

one of the defendants saying "Shove us in the name of a seller," inserted his own name in the invoice. The price agreed upon was paid, and the goods delivered to the defendants. Upon the occasion of the last sale, which was conducted nearly in the same manner, the defendants were aware who the sellers were, and what was the state of their circumstances. The sales took place on the 31st October, and the 2nd, 6th, and 16th of November, 1836: the fiat against Bowring & Garrod issued some time after the 6th, and before the 16th November.

His lordship left it to the jury to say—first, whether the bankrupts, Bowring & Garrod, were at the time of the sale insolvent and contemplating bankruptcy—secondly, whether the defendants knew at the time, or had the means of knowing, what was the state of Bowring & Garrod; for that, if they did, the payment made by them was not a payment really and bonâ fide made, within the meaning of the 6 Geo. 4, c. 16, s. 82.

The jury having returned a verdict for the plaintiffs for the value of the several parcels of goods—

Bompas, Serjeant, now moved for a new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence; or that the damages might be reduced by the value of the goods purchased before the date of the act of bankruptcy.—In *Ward* v. *Clarke*, M. & M. 497, where a bankrupt, after a secret act of bankruptcy, bought on credit, and sold for ready money at unusually low prices, the purchasers were held not protected by the 6 Geo. 4, c. 16, s. 82, unless the purchase was in the usual course of business: it was also held, that, if the purchaser knew the price to be greatly under the value of the commodity, the transaction would not be within the protection of the statute. But, though the goods are sold at a sacrifice, the sale is not, as regards the purchaser, fraudulent, provided it take place *before* an act of bankruptcy

has been committed. A sale to a bonâ fide purchaser of the whole of a trader's stock in trade, with an intention on the part of the trader to abscond with the money and cheat his creditors, is not an act of bankruptcy—*Baxter* v. *Pritchard*, 3 N. & M. 638, 1 Ad. & E. 456. In the present case there was no evidence to shew that the first three sales were made on account of Bowring & Garrod, or that they were insolvent and in danger of bankruptcy. [*Tindal*, C. J.—Surely that was a question for the jury.] Even if the defendants had such knowledge, or the means of knowledge, still they are entitled to retain the goods by way of lien for the money they really and bonâ fide paid for them; the case falling clearly within the protection of the 6 Geo. 4, c. 16, s. 82, which enacts that all payments really and bonâ fide made, or which shall hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund thesame to the assignees of such bankrupt, provided the persons so dealing with the said bankrupt had not at the time of such payment to such bankrupt notice of any act of bankruptcy by such bankrupt committed. The plea in question here was framed with a view to that enactment, and to the case of *Hill* v. *Farnell*, 9 B. & C. 45. There, A. purchased of B., a hop-merchant, a library, and paid him the value; B. at the time had committed an act of bankruptcy, of which A. had no knowledge: it was held that the assignees could not recover the value of the books without at least tendering the price, inasmuch as the payment made by A. was declared valid by the 6 Geo. 4, c. 16, s. 82; and, in order to give full effect to that enactment, A. must at least have a lien on the books in respect of which he had made the payment, until the assignees tendered him the sum paid. Under the statute now in force it is not necessary that the *sale* should be bonâ fide:

1837.

DEVAS v. VENABLES

the words are "all *payments* really and bonâ fide made," that is payments *actually* made. [*Vaughan*, J.—Can you separate the transaction, and call the sale fraudulent and the payment bona fide?] Undoubtedly: *Cash* v. *Young*, 2 B. & C. 413, 3 D. & R. 652, and *Hill* v. *Farnell*, go that length. [*Tindal*, C. J.—In those cases, the transaction, as regarded the purchaser, was an honest one.] The plaintiffs here are claiming through the bankrupts; the money received by them from the defendants may have been actually handed over to the plaintiffs: there is no reason, therefore, why they should recover back the goods without restoring the price paid for them.

TINDAL, C. J.—It will be convenient that I state to the court what were the facts proved in this case, and what my direction to the jury was; and if they are dissatisfied either with the verdict or with the manner in which the question was left to the jury, the rule must be granted; otherwise not. The question, which arose upon the traverse to the 5th plea, and which in effect involves the whole point at issue between the parties, was, whether the payment was really and bonâ fide made to Bowring & Garrod. It was contended at the trial, as it has been contended before the court, that the words *really and bonâ fide paid* meant no more than *actually* paid. But it occurred to me, and I am still of the same opinion, that these words import something more than the defendants' counsel is inclined to admit; I thought they meant something more than a real payment of the money, viz. whether the payment was fairly and honestly made in the course of a bonâ fide dealing between the parties; and that the question was whether or not the payment was made in pursuance of that which was upon the whole a real and bonâ fide transaction of sale. I therefore told the jury, that, whether the payment was or was not really and bonâ fide made, depended upon two distinct facts—first, whether

Bowring & Garrod were at the time of the sale insolvent and contemplating bankruptcy: and, if they found that these persons were in a state of insolvency, and did contemplate bankruptcy, then—secondly, whether the defendants knew or had the means of knowledge at the time that such was the state of Bowring & Garrod; for that, if so, the payment was not, within the words and meaning of the statute, bona fide. The jury found for the plaintiffs; concluding, no doubt, that enough appeared upon the surface of the transaction to put a reasonably prudent man upon his guard against that which was a palpably gross fraud. The jury evidently thought that the defendants did not make such inquiries as prudent and fair-dealing men would under the circumstances have felt themselves called upon to make; or that the prospect of profit held out to them was powerful enough to warp their better judgment. Kirby, the clerk of Bowring & Garrod, the witness upon whose testimony the case mainly rested, was an instrument in their hands for the perpetration of a very disgraceful and wicked scheme. He stated that he had heard from the bankrupts that it was their intention to make a purse for themselves; that, about the time of the transaction in question, they purchased more goods than usual; that these goods were removed during the night from the bankrupts' premises to the lodging of the witness, who was to effect the sale; that Garrod came there and gave directions; that the witness made the bargain with one of the defendants at a price considerably under the prime cost of the goods; that he told the defendants the affair must be kept secret, and mentioned no seller's name, whereupon one of the defendants said—"Shove us in the name of a seller;" and that the witness inserted his own name in the invoice as the seller. The case was one entirely for the consideration of the jury: it was for them to say whether or not a payment made under such circumstances could be a bona fide payment; and I

1837.

DEVAS v. VENABLES.

am not dissatisfied with their verdict. With respect to the sale that took place after the act of bankruptcy, the plaintiffs are clearly entitled to recover for that.

PARK, J.—I am clearly of opinion that the verdict ought not to be disturbed. The jury would have scandalously neglected their duty had they come to any other conclusion.

VAUGHAN. J.—I am of the same opinion. To induce us to grant a new trial, it must be made clearly to appear to us either that there has been a substantial misdirection on the part of the judge, or that the verdict is manifestly against the weight of evidence. Nothing of the kind appears here. The construction put by his lordship upon the 82nd section of the 6 Geo. 4, c. 16, I think was perfectly correct. To protect the payment, the whole transaction must be bona fide. In the present case, it is impossible to doubt that the whole affair was a gross fraud, or to say that the jury have done wrong.

Rule refused.

TRENTHAM and Another, Executors of CROWTHER, Deceased, *v.* DEVERILL.

Saturday, Jan. 14th.

In order to take a case out of the statute of limitations, the defendant's nephew and clerk was called, and an account in the handwriting of the defendant was put into his hands, with the following memorandum (which the witness admitted to be in his handwriting) thereunder written:—"Paid 12*l.* 10*s.* interest to May 13, 1830." The witness professed to have no recollection whatever of this payment: but stated that he had a general authority to settle all accounts for his uncle:—Held, that this was evidence for the jury.

ASSUMPSIT on a promissory note dated 13th May, 1834, payable on demand, with interest. Plea—actio non accrevit infra sex annos. Issue thereon.

At the trial before Park, J., at the last Summer Assizes for Nottinghamshire, in order to take the case out of the statute, a witness named William Deverill, the defendant's nephew, was called to prove a payment of interest within six years. A paper coming out of the possession of the

1837.

TRENTHAM v. DEVERILL.

plaintiff was put into the witness's hand, purporting to be an account (and stated by the witness to be in the handwriting of the defendant) delivered by the defendant to the plaintiff's testator, for beer (the defendant was a brewer) supplied to him in the year 1829, amounting to 5*l.* 8*s.*, with a receipt at the bottom, thus—" 1830, Nov. 8, received, Wm. Deverill," which the witness stated to be in his own handwriting; and this further memorandum at the foot, in the same handwriting—" Paid 12*l.* 10*s.* interest to May 13, 1830," but of which payment the witness professed to have no recollection whatever. The witness stated that he had a general authority to settle all accounts for his uncle.

It was objected, for the defendant, that this memorandum was no evidence of the payment of interest on the note in question, inasmuch as it formed no part of the account delivered by the defendant, and was not an act which William Deverill appeared to have authority to do on the defendant's behalf. It was further objected that the paper in question was not admissible as a receipt, for want of a stamp; nor as an acknowledgment of a debt so as to take the case out of the statute of limitations, there being no signature by the defendant. Park, J., received the evidence with hesitation: but reserved the defendant leave to move. A verdict was thereupon taken for the plaintiff for 26*0l.*

Adams, Serjeant, in Michaelmas Term last, in pursuance of the leave reserved, obtained a rule nisi to enter a nonsuit. He cited *Willis* v. *Newham*, 3 Y. & J. 518, *Whippy* v. *Hillary*, 3 B. & Ad. 399, 2 C. & P. 209, and *Hyde* v. *Johnson*, ante, Vol. 3, p. 289, 2 New Cases, 776.

Talfourd, Serjeant, shewed cause.—The witness William Deverill, who stated that he had a general authority

1837.

TRENTHAM v. DEVERILL.

to settle all accounts for his uncle, sufficiently proved the payment of interest by himself: at all events, whether he did or not, was purely a question for the jury. If this had been an acknowledgment in writing by an agent, it would have been ample proof of the payment of interest under the 9 Geo. 4, c. 14. *Willis* v. *Newham* merely decided that a *verbal* acknowledgment of the payment of part of a debt within six years, was not sufficient within that statute to take the case out of the 21 Jac. 1, c. 16. That case, therefore, has no application to the case of a memorandum by an agent having competent authority, that he on a given day paid a certain sum for interest on account of his employer. The document in question is nothing more than a mere memorandum of a payment: it is no receipt. In *Waters* v. *Tompkins*, 1 Tyr. & Granger, 137, the court of Exchequer, speaking of *Willis* v. *Newham*, say that the court in that case decided "that the verbal acknowledgment of part payment of a debt was insufficient; and they construed the act [9 Geo. 4, c. 14,] as containing a general provision that in *no case* should an acknowledgment or promise in words *only* be sufficient to take the case out of the statute of limitations, whether such acknowledgment were of the existence of the debt or of the fact of part payment; and they considered the proviso as leaving to the fact of part payment, if properly proved, that is, not by an acknowledgment *only*, the same effect which it had before the statute." *Hyde* v. *Johnson* was the case of an acknowledgment of a debt and promise to pay, not *by the party to be charged*, but by an agent—a case not contemplated by the statute.

Adams, Serjeant, in support of the rule.—The account put in in no way referred to the note upon which the interest was supposed to be due. The case stands precisely in the same position as it would have stood in had William Deverill not been put into the witness-box at all, but ano-

ther person had been put in, and had stated that William Deverill was duly authorized as agent of the defendant, and that the memorandum as to the payment of interest was in his handwriting. There was no evidence to go to the jury of the fact of payment.

1837.

TRENTHAM v. DEVERILL.

TINDAL, C. J.—It appears to me that the only question here is whether or not the jury have found a correct verdict. There was some evidence. It is clearly not a case for a nonsuit. Inasmuch, however, as the witness, from some little misapprehension at the trial, does not appear to have been sufficiently sifted, I think the cause should go down again, the plaintiffs, if they succeed on the second trial, to have the costs of both.

The rest of the court concurring—

Rule absolute accordingly.

BETTELEY *v.* M'LEOD.

Monday, Jan. 16th.

THIS was an action on the case brought to recover from the defendant the sum of *92l.* 17*s.*, for expenses which it was alleged the plaintiff had been put to in consequence of his having, by reason of the non-attendance of the defendant, who had been subpœnaed by the plaintiff to give evidence for him in a cause pending in this court between the plaintiff and the father of the witness, been compelled to withdraw the record and pay the defendant in that action his costs of the day.

In an action on the case against a witness for neglecting to attend on a subpœna, the declaration stated that the plaintiff, at the time of serving the defendant with the subpœna, paid him a certain sum of money, to wit, *one shilling*, being a reasonable sum of money for his costs and charges in and about his attendance as a witness. The defendant pleaded that a reasonable sum for the costs and charges in and about the attendance of the defendant as such witness was not paid or tendered to the defendant: whereupon issue was joined. At the trial it appeared that the witness lived at Camberwell, the cause in which he was subpœnaed being to be tried at Guildhall; that, on the plaintiff's attorney serving the defendant with the subpœna, the latter observed that he had already been subpœnaed by the other side: upon which the attorney said he supposed the defendant would not, as he had already received one guinea, require another, to which the defendant answered "Certainly not;" and that the attorney then gave him a shilling, which he accepted:—Held, that this evidence sustained the issue.

1837.

BETTELEY v. M'LEOD.

The declaration alleged, amongst other things, that the plaintiff caused the subpœna to be made known and shewn to the defendant, and caused a copy to be left with him of so much of the said writ of subpœna as related to the defendant, and then paid to the defendant a certain sum of money, to wit, the sum of *one shilling*, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor and effect of the said writ of subpœna; that the defendant was called on his subpœna to appear at the sitting of the court, according to the tenor and effect of the said subpœna and his duty in that behalf; that the plaintiff had a good cause of action against the then defendant; that the present defendant was a material and necessary witness on his behalf; that he failed to attend in obedience to the said subpœna; and that the plaintiff was compelled thereby to withdraw the record, &c.

Plea—that, at the time of the supposed service of the subpœna in the declaration in that behalf mentioned, a reasonable sum of money for the costs and charges in and about the attendance of the defendant as such witness was not paid or tendered to the defendant: whereupon issue was joined.

The cause was tried before Tindal, C. J., at the sittings at Guildhall after last Trinity Term. The facts, as sworn to by the plaintiff's attorney, whose evidence was uncontradicted, were as follow:—The defendant resided at Camberwell. On the plaintiff's attorney attending to serve him with a subpœna, the defendant observed that he had already been subpœnaed as a witness for the defendant in that action; and, upon his admitting that he had received a guinea on that occasion, the attorney asked him if he would require a second guinea, to which he answered "certainly not." The plaintiff's attorney thereupon tendered him one shilling, which the defendant received. On the cause being called on about twenty

minutes before 10 o'clock, the plaintiff's attorney caused the witness (the present defendant) to be called on his subpœna, and, the witness not appearing, the record was withdrawn. The defendant was in court at a quarter before 10. The plaintiff was afterwards compelled to pay the then defendant *27l.* 10*s.*, for his costs of the day, besides his own expenses.

On the part of the defendant, it was contended that the plaintiff had prematurely withdrawn the record, and therefore, whatever injury he had sustained had resulted from his own act; for that it was not necessary that the witness should be in court when the cause was called on (*a*); it is enough if he be there in time to be examined. It was further contended, that the plaintiff was bound to shew that he had paid the witness a reasonable sum for his expenses in giving his attendance, before he could charge him for a breach of duty in not attending: and that one shilling was clearly insufficient for the purpose.

His lordship told the jury (a special jury) that a shilling was not sufficient conduct money under the circumstances; but that, if they believed the statement made by the plaintiff's attorney, there was ample evidence of an agreement on the paft of the defendant to dispense with the usual payment, and therefore the plaintiff was entitled to a verdict.

A verdict was thereupon taken for the plaintiff for *27l.* 10*s.*, the sum paid by him for costs of the day to the defendant in the former action, his own costs on that occasion to be added when taxed.

(*a*) In Bland v. Swafford, Peake's N. P. C. 60, it was held that no action lies against a witness for non-attendance, unless the cause were called on and the jury sworn. But, in a later case, Barrow v. Humphreys, 3 B. & Ald. 598, it is said that it seems that a party who is subpœnaed to attend at the assizes as a witness, is guilty of a contempt by neglecting to do so, although the cause be not called on for trial.

1837.

BETTELEY v. M'LEOD.

Platt, in Michaelmas Term, moved for a rule nisi for a new trial, on the grounds that the verdict was against evidence (the witness for the plaintiff having been contradicted at the trial on some collateral points, and therefore, it was suggested, generally disentitled to credit); and that the averment that a reasonable sum for his costs and charges in and about his attendance as a witness had been paid to the defendant, was not proved. He submitted that this not being an action upon the statute 5 Eliz. c. 6, s. 12, but an action on the case for special damages, the plaintiff was bound to aver and to prove a sufficient consideration whereon to found the alleged duty of the defendant; and that, if there had been any agreement on the part of the defendant to dispense with the payment or tender of reasonable expenses, such agreement should have been set out in the declaration.

Talfourd, Serjeant, and *F. Kelly*, shewed cause.—The witness was believed by the jury; his evidence was not impeached or contradicted in any material degree: there is therefore no pretence for saying that this was a verdict against evidence. Then, with respect to the reasonableness of the sum paid to the defendant with his subpœna. He having been already subpœnaed by the other side, and having received a proper allowance for his expenses, one shilling in addition was a reasonable sum for the plaintiff to pay him, and therefore the averment was well proved. The defendant, indeed, would have been guilty of a fraud (*b*) had he required anything further—*Benson* v. *Schneider*, 1 Moore, 76, 7 Taunt. 337.

Platt and *W. H. Watson*, in support of the rule.—It was incumbent on the plaintiff to prove every material allegation in his declaration. He has alleged that he "paid to the defendant a certain sum of money, to wit,

(*a*) See Crompton v. Hutton, 3 Taunt. 230.

the sum of one shilling, *being a reasonable sum of money for his costs and charges in and about his attendance as a witness*, according to the tenor and effect of the writ of subpœna." He was therefore bound to prove that a shilling was a reasonable sum for the purpose. It was, however, admitted not to be so: and the allegation is not supported by proof of a further payment by the adverse party. If any duty be by law imposed upon the defendant, it is by reason of some adequate consideration *emanating from the plaintiff*. *Benson* v. *Schneider*, if any authority either way, is rather in favour of the defendant. If the plaintiff had intended to rely on the supposed dispensation, the declaration should have been framed accordingly—*Jones* v. *Barkley*, 2 Doug. 684.

TINDAL, C. J.—This case comes before us on a motion for a new trial after a verdict pronounced for the plaintiff by a special jury who have heard the whole evidence: and one of the grounds upon which a new trial is sought, is, that the only witness who was called on the part of the plaintiff ought not to have been credited, because his testimony was contradicted on some collateral points. I think, however, that is no ground for granting a new trial. The constitution of this country has made the jury the proper judges of the degree of credit due to witnesses who appear before them: and very properly, for they have the best means of judging from the appearance and demeanor of the witness what his testimony is worth.—The next objection is, that the evidence adduced at the trial did not support the issue joined between the parties. The allegation in the declaration is, that the plaintiff paid to the defendant a certain sum of money, to wit, the sum of one shilling, being a reasonable sum of money for his costs and charges in and about his attendance as a witness according to the tenor and effect of the writ of subpœna. The plea states, that, at the time of the supposed service

1837.

BETTELEY v. M'LEOD.

of the subpœna in the declaration in that behalf mentioned, a reasonable sum of money for the costs and charges in and about the attendance of the defendant as such witness was not paid or tendered to the defendant. And this is the precise issue raised between the parties. Now, it is well known, that, before an action can be maintained, or a motion for an attachment can be entertained, against a witness for non-attendance in obedience to a subpœna, a reasonable sum for his expenses in going to, attending at, and returning from the trial, must be paid or tendered to the party. And the simple question here is, whether, under the circumstances, a reasonable sum had not been paid to this defendant. I take the reasonableness of the sum to depend upon the actual expense cast upon the witness, whether paid by the one side or the other. That which would not be a reasonable sum where the witness is subpœnaed by one party only, may be so when received from each (*c*). What was the state of the witness in the present case? He resided at Camberwell. The cause was set down for trial at Guildhall. A shilling could hardly be said to be a reasonable sum for his expenses to and fro. But he had already received a guinea with his subpœna from the defendant in that action; and therefore there was no reason why he should require a second guinea. The matter, however, does not rest here. The evidence of the plaintiff's attorney established an agreement on the part of the witness to consider a shilling to be, under the circumstances, a reasonable and sufficient sum to cover his expenses. The rule must be discharged.

PARK, J.—There is clearly no ground for sending this cause down again as for a verdict against evidence. The question was properly left to the jury, and competently

(*c*) As to the measure of necessary expenses, see Chapman v. Paynton, 13 East, 13, n.

1837.

BETTELEY v. M'LEOD.

decided by them. With respect to the other point, the question was, whether, under all the circumstances, a shilling was a reasonable sum for the witness's expenses. He admitted that he had already received a guinea from the other side, and expressly declined to require anything more. I therefore think a shilling was enough.

VAUGHAN, J.—In the abstract, certainly, a shilling would not be a reasonable sum. But, having consented to take a shilling, I think the defendant is precluded from saying that that was not a reasonable sum.

Rule discharged (*d*).

(*d*) See Mullett v. Hunt, 1 C. & M. 752, 3 Tyr. 875.

MARKS and Another, Assignees of COLNAGHI, a Bankrupt, *v.* LAHEE.

Monday, Jan. 16th.

In trover by the assignees of a bankrupt to recover the value of certain plates, and also of certain etchings, prints, &c., belonging to the bankrupt, the defendant pleaded, as to the etchings, &c., that the bankrupt, on &c., and on divers other days and times afterwards, retained and employed him to impress and print divers etchings &c., that the bankrupt was indebted to him in a certain sum in respect of his said work and labour, and that he detained the said etchings, &c., as a security and lien for his said debt. The plaintiffs replied that the etchings, &c., were printed from ten different plates, and that the defendant was retained and employed by the bankrupt to print them under separate and distinct contracts and agreements:—Held, that the replication did not tender an immaterial issue.

As to the plates, the defendant set up a lien by agreement; to which the plaintiffs replied that the defendant had received a sum in part discharge of his lien, and that they tendered him a certain other sum, *to wit*, 100*l.*, in satisfaction and discharge of the residue, such sum being more than sufficient to discharge the same, but that the defendant refused to receive it: the defendant rejoined that the said sum so tendered in satisfaction and discharge of the residue of the lien was not sufficient to satisfy and discharge the same:—Held, that the point in issue was, whether or not the 100*l.* tendered was a sufficient sum to cover the residue of the lien claimed by the defendant, notwithstanding the sum was stated under a videlicet; and that the *fact* of that sum having been tendered was admitted.

In order to prove the tender alleged in the replication to the first plea, the plaintiffs offered in evidence two entries made by a deceased clerk of the plaintiffs' attornies in a diary kept by him according to the course of business in the office, in which it was his duty to enter daily every transaction in which he was engaged. By the first of these entries the clerk acknowledged the receipt by him of 100*l.* for the purpose of tendering it to the defendant. This was received without objection. The second entry was as follows:—"Attending Mr. L., tendering him 100*l.* for each of the plates, &c., when he declined to let me have same," &c.:—Held, that both these entries were properly admitted, both operating to charge the party by whom they were made, and appearing to have been made in the usual course of business, by a party having peculiar means of knowing the fact, and no interest in mis-stating it, and capable of being examined to the fact had he been living.

1837.

MARKS v. LAHEE.

First plea.

certain plates, etchings, pictures, impressions, prints, paper, and copper, alleged to have been the property of the bankrupt before and at the time of his bankruptcy.

The defendant pleaded—first, *as to the plates and copper*, that, before Colnaghi became a bankrupt, and before the said time when &c., to wit, on the 18th April, 1831, he was indebted to the defendant in a certain sum, to wit, the sum of 130*l.*, for money lent and advanced by the defendant to Colnaghi, and for interest thereon; that Colnaghi had indorsed and delivered to the defendant for value a certain bill of exchange, drawn by Colnaghi upon and accepted by one Henry Baylis, for the payment of 45*l.*, and to become due on the 16th June, 1831; and that the defendant then had in his custody and possession, by and with the consent of Colnaghi, the said plates and copper; that it was then, and before Colnaghi became a bankrupt, agreed by and between Colnaghi and the defendant, in consideration of the premises, that the said plates and copper should be placed and remain in the defendant's custody and possession as a security, and that the defendant should have a lien thereon for the repayment of the said debt so due and owing from Colnaghi to the defendant, and for the payment of the said bill of exchange, and that the defendant should hold and retain the said plates and copper till the said debt and the said bill for 45*l.* should be paid: that afterwards, and before Colnaghi became a bankrupt, and before the said time when &c., to wit, on &c., Colnaghi, in pursuance of the said agreement, did place and suffer to remain in the defendant's custody the said plates and copper as such security, and give him a lien thereon; that the said debt and bill of exchange, or either of them, had not at any time been paid to the defendant; for which reason, and as such security and lien, the defendant, before and at the said time when &c., kept and detained the said plates and copper, as he lawfully might for the cause aforesaid, and

1837.

MARKS v. LAHEE.

which was the said supposed conversion and disposal of the said plates and copper in the declaration mentioned, to the defendant's use—verification.

Second plea.

Secondly—That Colnaghi, before he became a bankrupt, and before the said time when &c., to wit, on &c., and on divers other days and times afterwards, retained and employed the defendant to bestow his work and labour to impress and print divers etchings, pictures, impressions, and prints upon paper for the said Colnaghi, for hire and reward to the defendant in that behalf; and thereupon the defendant, afterwards, and before Colnaghi became a bankrupt, and before the said time when &c., to wit, on &c., and on the said other days and times, did, under and by virtue of the said retainer and employment, bestow his work and labour, and impress and print upon paper and otherwise, divers, to wit, one hundred etchings, one hundred pictures, one hundred impressions, and one hundred prints, upon divers, to wit, five hundred reams of paper, and otherwise, being the same identical etchings, pictures, impressions, prints, and paper in the declaration mentioned; and thereupon Colnaghi then became and was indebted to the defendant for and in respect of his said work and labour, and the said etching, drawing, impressing, and printing, in a large sum of money, to wit, in the sum of 500*l.*; and, the said etchings, pictures, impressions, prints, and paper, having at all times remained and continued in the custody and possession of the defendant, and the said debt remaining due and unpaid, the defendant, before and at the said time when &c., did detain the said etchings, pictures, impressions, prints, and paper, as a security and lien for the said debt; which was the said supposed conversion and disposal thereof to his own use as in the declaration mentioned—verification.

Replication to the first plea.

Replication to the first plea—That, before the commencement of this suit, and before the said conversion in the declaration and first plea mentioned, a large sum of

1837.

MARKS v. LAREE.

money, to wit, the sum of 104*l.*, was had and received by the defendant on account of the plaintiffs, and with their consent, and was so received and accepted by the defendant in discharge of so much of the said lien in the said first plea mentioned: that, after the said money was so received and accepted as aforesaid, and before the said conversion in the declaration mentioned, the plaintiffs were ready and willing, and tendered and offered to the defendant to pay him a certain other large sum, to wit, the sum of 100*l.*, in satisfaction and discharge of the residue of the said lien in the first plea mentioned, such last-mentioned sum being more than sufficient to satisfy and discharge the same; which sum the defendant wholly refused to accept or receive of or from the plaintiffs—verification.

Replication to the second plea.

Replication to the second plea.—That the said etchings, pictures, impressions, and prints in the second plea mentioned were impressed and printed from divers, to wit, ten different plates delivered for that purpose by Colnaghi to the defendant; and the defendant was retained and employed by Colnaghi to impress and imprint the same as aforesaid, under separate and distinct contracts and agreements with Colnaghi—verification.

Rejoinder to the replication to the first plea;

Rejoinders—That the said sum so tendered and offered to the defendant as aforesaid in satisfaction and discharge of the residue of the said lien in the first plea mentioned, was not sufficient to satisfy and discharge the same, in manner and form as the plaintiffs had above in their replication first alleged—concluding to the country.

to the second plea.

That the defendant was not retained and employed by Colnaghi to impress and imprint as aforesaid under separate and distinct contracts and agreements with Colnaghi, in manner and form as the plaintiffs had in their replication secondly alleged—concluding to the country.

At the trial before Tindal, C. J., at the sittings in London after last Easter Term, the plaintiffs, in order to prove

1837.

MARKS v. LAHEE.

the tender alleged in the replication to the first plea, offered in evidence two entries made in the day-book of their attornies by a deceased clerk, named Riddle, bearing date the 9th October, 1834. The first of these entries contained an acknowledgment by Riddle of his having received from his employers 100*l.* for the purpose of making a tender of that sum to the defendant. This entry was received without objection. The second entry (which was objected to) was as follows:—"Re Colnaghi. Attending Mr. Lahee, tendering him 100*l.* for each of the plates and the etching of the Queen separately; when he declined to let me have same, and said he had no objection to deliver up the impressions upon payment of the expenses of making them." In order to shew the course of business in the office of the plaintiffs' attornies, one of the clerks was called. He stated that each clerk in the office was required daily to make an entry of every transaction in which he had been engaged. This witness proved the death of Riddle; that the entries in question were in his handwriting, and were made on the day on which they bore date; and that the entries in question had been posted by him (the witness) into a ledger, with Riddle's knowledge.

The sufficiency of the tender was not disputed. But it was contended that the second entry (which was the only evidence to prove the fact of a tender having been made) was not admissible, on the ground that it did not charge the clerk who made it, but, on the contrary, rather tended to shew that he had done his duty. The objection was over-ruled, and a verdict taken for the plaintiffs—leave being reserved to move to enter a verdict for the defendant on the first issue, if the court should be of opinion that the entry by the deceased clerk was not properly admitted.

Alexander, in Trinity Term last, accordingly obtained

1837.

MARKS v. LAHEE.

a rule nisi to enter a verdict for the defendant on the first issue, and to arrest the judgment on the second issue, on the ground of immateriality. He cited *Chambers* v. *Bernasconi*, 1 Tyr. 335, 1 C. & J. 451, (S. C., in error, 1 C. M. & R. 347, 4 Tyr. 531), *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890, and *Poole* v. *Dicas*, 1 Scott, 600, 1 New Cases, 649.

As to the second issue.

Bompas, Serjeant, and *R. V. Richards*, now shewed cause.—The issue raised by the replication to the second plea is not immaterial. It shews that the defendant had no right to detain the etchings, pictures, impressions, and prints for the entire debt, the work having been done by him upon several distinct contracts with the bankrupt; and the jury have so found. If one claims to hold a chattel in respect of a lien which fails, he cannot maintain his lien at all—*Chase* v. *Westmore*, 5 M. & S. 180. Here the defendant claims a lien in respect of a retainer by the bankrupt on a certain day *and on divers other days and times afterwards*; not shewing distinctly whether the work was done upon one contract or upon several. The replication shews that the second plea is substantially incorrect; and that cannot be an immaterial issue which shews that the plea is bad.

Where a tender is pleaded, the amount tendered is material, and the fact of its being stated under a videlicet does not render it immaterial—*Symmons* v. *Knox*, 3 T. R. 65, *Grimwood* v. *Barritt*, 4 T. R. 460, and the cases there cited, and *Williams* v. *Price*, 3 B. & Ad. 695.

As to the first issue.

The rejoinder to the replication to the first plea admits the fact of a tender having been made, but alleges that it was insufficient; and issue is thus taken on the sufficiency of the sum tendered. At the trial the sum tendered was admitted to be sufficient: nothing therefore remained to be proved to sustain the issue. But, if the plaintiffs were bound to prove the tender, the evidence offered by them

1837.

MARKS v. LAHEE.

As to the admissibility of the entry.

at the trial was amply sufficient for that purpose. The entry in the diary by the deceased clerk, Riddle, was properly received in evidence. It was proved to have been made by him in the usual course of business, it related to fact peculiarly within his knowledge, and it charged himself. The first entry, which was admitted without objection, contained an acknowledgment by Riddle that he had received 100*l.* for the purpose of tendering that sum to the defendant; that clearly charged him: the second entry stated that Riddle had made the tender, and that *the defendant refused to accept it;* that equally operated to charge the deceased, for it amounted to an acknowledgment that he still held the 100*l.* to the use of his employers. *Higham* v. *Ridgway*, 10 East, 109, is the first case where the point appears to have precisely arisen: and it was there held, that, if a person have peculiar means of knowing a fact, and make a declaration or written entry of the fact, which is against his interest at the time, it is evidence of the fact, as between third persons, after his death, if he could have been examined to it in his life-time (*a*); and therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. Even if the entry in question did not charge the party making it, it would still have been receivable in evidence as an entry made by one in the usual course of his employment, and of a fact as to which the individual might have been examined had he been living. *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890, is precisely in point: there it was proved to be the usual course of practice in an attorney's office for the *clerks* to serve notices to quit on tenants,

(*a*) But see Short v. Lee, 2 Jac. & W. 489.

1837.

MARKS v. LAHEE.

and to indorse on duplicates of such notices the fact and time of such service; and, on one occasion, *the attorney himself* prepared a notice to quit to serve on a tenant, took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of them were proved to have been delivered by him on that occasion: on the trial of an ejectment after the attorney's death, it was held that the indorsement so made by him was admissible to prove the service of the third notice. So, in *Poole* v. *Dicas*, 1 New Cases, 649, 1 Scott, 600, it was held that an entry of the presentment and dishonour of a bill of exchange, made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the bill, might be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry. *Chambers* v. *Bernasconi* is, as far as it goes, a confirmation of the doctrine laid down in the preceding cases: but there the entry which it was proposed to give in evidence was quite beside the duty of the party by whom it purported to be made; it was an entry of a fact that was perfectly immaterial at the time it was made, and formed no part of the ordinary duty of a sheriff's officer.

As to the second issue.

Alexander and *Butt*, in support of the rule.—The defendant by his second plea claims a lien in respect of each set of impressions; and the replication merely reiterates the lien set up by the plea. The evidence was that the plates from which the impressions were taken came to the defendant's hands at different times. If the plea be, as is suggested, objectionable as claiming one lien in respect of several distinct contracts, the plaintiffs should have demurred. As, however, they have thought fit to take an issue that turns out to be immaterial, there must be a repleader.

1837.

MARKS v. LAHEE.

With respect to the replication to the first plea—It is said that the defendant, by taking issue in his rejoinder on the *sufficiency* of the tender, admits the *fact* of a tender of 100*l.* having been made. That, however, is not so. The defendant could not deny by his rejoinder that the plaintiffs had tendered 100*l.*; for, they have not distinctly alleged it; the sum, being laid under a videlicet, was immaterial. [*Vaughan*, J.—If the defendant had rejoined that the plaintiffs did not tender 100*l.*, would the rejoinder have been objectionable?] Undoubtedly it would; for, the material issue tendered by the replication was, whether or not a sufficient sum had been tendered to discharge the defendant's lien—*Williams* v. *Price*, 3 B. & Ad. 695.

As to the first issue.

It is of vital importance to the interests of suitors, whose rights are to be bound by the evidence that is received, that the general rule which requires all evidence to be given upon oath, should be fettered by the introduction of few exceptions. In particular cases, this general rule has unavoidably been departed from: but in no case is the exception so important in its consequences as in one like the present. The first entry was not objected to at the trial, inasmuch as the clerk who made it thereby expressly charged himself with the receipt of the money. That entry, however, does not shew the purpose for which the 100*l.* was so received by Riddle. As to the other entry, it may be conceded, that, if Riddle himself had been called, and stated that he had tendered 100*l.* to the defendant, that would have been conclusive. But the second entry, standing by itself, contains no charge binding the party himself; and the first cannot be called in aid. The general proposition, that an entry is admissible if made in the usual course of the party's business or employ, is far too broad. [*Vaughan*, J.—And without any motive to mislead.] How are we to ascertain the motive? The motives of men are infinitely various. *Poole* v. *Dicas*,

As to the admissibility of the entry.

1837.

MARKS v. LAHEE.

assumes that it is a man's interest to do his duty. It may with more truth be said to be a party's interest to *say* he has done his duty. *Poole* v. *Dicas* stands upon the same principle as the previous case of *Doe* d. *Patteshall* v. *Turford*, which went much further than any of the earlier cases, and the principles of which the court are not likely to be anxious to extend. And in both these cases there were corroborating circumstances, which are wanting here. [*Vaughan*, J.—The absence of corroborating or confirmatory circumstances may have weight with a jury; but it does not go to the admissibility of the evidence.] It may well be that there is a known course of business as to the presentment of bills of exchange or the service of notices; but there can be none such as to the making of a tender, which is a mixed question of law and fact. Many entries in an attorney's book are made at the dictation of the attorney himself. If an entry like this be admissible on the ground of its having been made in the usual course of the party's employ, the whole business transacted in an attorney's office may be proved in the same manner; even the retainer might be proved in the same way. In *Chambers* v. *Bernasconi*, 1 C. & J. 459, Bolland, B., says: "I have always considered the cases which have been alluded to as carrying the doctrine too far, and I should be very sorry to give any opinion which might have the effect of carrying it further." When that case afterwards came before the Exchequer Chamber (1 C. M. & R. 347, 4 Tyr. 531), it was distinctly laid down that a written memorandum of an arrest, and the place where it occurred, made by a sheriff's officer contemporaneously with the arrest, and sent by him immediately to the sheriffs' office, and there filed in the course of business, was not admissible evidence of the place at which the arrest was made, after the death of the officer, in an action between third persons. Tindal, C. J., on that occasion, observed: "A clerk may have a present interest in deceiv-

ing his employers; for, by entering a service as made, though he has neglected to do so, he avoids inquiry at the time, and he may hope it will never be in question; while, if he lives, it would never be offered in evidence." In *Calvert* v. *The Archbishop of Canterbury*, 2 Esp. 646, it was ruled by Lord Kenyon, that an entry made in the books of the plaintiff, specifying the terms of an agreement, was not made evidence, where the person who made it was dead, by proof of his handwriting: and in *Sikes* v. *Marshall*, 2 Esp. 705, the same learned judge held, that, where entries have been made by a clerk who is since dead, proof of his handwriting will not make such entries evidence. Hullock, B., also, in *Gale* v. *Partington*, M'Clel. & Y. 357, held that entries made by a deceased solicitor are not evidence of business done by him.

TINDAL, C. J.—This is an action of trover brought to recover the value of certain copper plates, etchings, and engravings which, as the plaintiffs contend, the defendant has converted to his own use. The first plea, as to the plates and copper, states that Colnaghi, the owner of the plates, before he became bankrupt, was indebted to the defendant in 130*l.* for money lent, and that the defendant was a holder for value of a bill of exchange for 45*l.*, drawn and indorsed to him by Colnaghi; that the defendant then had the plates and copper in his custody, with the consent of Colnaghi; and that it was agreed between them that the said plates and copper should remain in the defendant's possession as a security, and that the defendant should have a lien upon them for the repayment of the above-mentioned sums; that those sums respectively remained unpaid, wherefore the defendant detained the plates and copper, as he lawfully might &c. To this plea the plaintiffs replied, that, before the conversion, 104*l.* had been received by the defendant on account of the plaintiffs, and with their consent, and accepted by him in discharge of so

1837.

MARKS v. LAHEE.

much of the lien in the first plea mentioned; and that the plaintiffs tendered a further sum of 100*l.* in discharge of the residue, being more than sufficient to satisfy the same, which the defendant refused to receive. The defendant rejoined that the said sum so tendered and offered to the defendant in satisfaction and discharge of the residue of the lien in the first plea mentioned, was not sufficient to satisfy and discharge the same.

The second plea, which is addressed to the etchings, pictures, impressions, and prints, states that Colnaghi, before he became bankrupt, to wit, on &c., and on divers other days and times afterwards, retained and employed the defendant to impress and print divers etchings, pictures, impressions, and prints upon paper, for hire and reward to the defendant in that behalf; that the defendant, afterwards, and before Colnaghi became a bankrupt, to wit, on &c., and on the said other days and times, did, under and by virtue of the said retainer and employment, impress and imprint upon paper and otherwise, divers, to wit, one hundred etchings, &c., being the same identical etchings, &c., as in the declaration mentioned; that thereupon Colnaghi became and was indebted to the defendant for and in respect of his said work and labour in the sum of 500*l.*; and that the said etchings, pictures, impressions, prints, and paper, having at all times remained and continued in the defendant's custody and possession, and the said debt remaining due and unpaid, the defendant detained them as a security and lien for the said debt. The plaintiff replied that the said etchings, pictures, impressions, and prints in the second plea mentioned were impressed and printed from divers, to wit, ten different plates delivered for that purpose by Colnaghi to the defendant; and that the defendant was retained and employed by Colnaghi to impress and imprint the same under separate and distinct contracts and agreements with Colnaghi. The defendant rejoined, that he was not retained and employed by Col-

1837.

MARKS v. LAHEE.

naghi to impress and imprint as aforesaid under separate and distinct contracts and agreements.

As to the second issue.

With respect to the second plea, it has been contended on the part of the plaintiffs, that the defendant was at most only entitled to a lien upon each etching for the work and labour expended upon each; and that the plea, upon the face of it, discloses several distinct contracts, inasmuch as it alleges that the defendant was retained "on &c., and on divers other days and times afterwards." On the part of the defendant, it is answered that the plaintiffs should have demurred; and that, the issue they have tendered by their replication being immaterial, there must at all events be a repleader. It is important, therefore, to bear in mind the very terms of the plea and of the replication. The plaintiffs might, it is true, have taken their stand upon the plea. But, have they done more than from over-caution stated in their replication that which the defendant says he meant by his plea? and, how can we say that the issue is immaterial, when the very point would have been presented for the consideration of the court by a demurrer to the plea? But, looking at the plea, I think it is by no means clear that the defendant meant to point to several contracts; for, although the plea begins by stating that Colnaghi, on &c., and on divers other days and times afterwards, retained and employed the defendant, &c., it goes on to state that the defendant did the work under and by virtue of the *said retainer and employment*, and concludes with a claim of lien for *the said debt*. At all events, it bears a double aspect; and the plaintiffs have done quite right in endeavouring to clear up the ambiguity by distinctly averring that the defendant was retained by Colnaghi to do the work, under separate and distinct contracts and agreements. It is too much to say, after the jury have found their verdict on the precise issue, that we ought to award a repleader, which would only bring the parties to the same point.

1837.

MARKS v. LAHEE.

As to the first issue.

By his first plea, the defendant claims a lien upon the plates and copper for a debt alleged to be due to him from Colnaghi. The replication states that the defendant had been paid a part of the debt, and that the plaintiffs afterwards tendered him a certain other sum, to wit, 100*l.*, in satisfaction and discharge of the residue of the lien, such sum being more than sufficient for the purpose. The replication states two distinct facts—first, that 100*l.* were tendered—secondly, that that sum was sufficient to discharge the remainder of the lien. To this the defendant simply rejoins that the sum so tendered in satisfaction of the residue of his lien, was insufficient. No person of ordinary understanding could for a moment doubt that the real question intended to be raised between the parties here was, whether the 100*l.* tendered was a sufficient sum to cover the residue of the lien claimed by the defendant; and that the fact of the tender itself was not in dispute. On the part of the defendant, however, it is contended that the sum, being stated under a videlicet, was immaterial, and that the only fact essential to prove was the sufficiency of the tender. The general rule is, that, where matter is necessary to be alleged, it must be proved, although laid under a videlicet. In *Symmons* v. *Knox*, 3 T. R. 65, and *Grimwood* v. *Barritt*, 6 T. R. 460, it was held, that, in an action on a bond, the defendant must set forth in his plea what is really due on the bond, before he is entitled to set off any cross demand under the statute 8 Geo. 2, c. 24, s. 5; and, such averment being material and traversable, the addition of a videlicet does not alter its character. The sum tendered in the present case is very material to the ascertaining the respective rights of the parties; and it clearly cannot be rendered immaterial by being laid under a videlicet. This is fully borne out by the late case of *Williams* v. *Price*, 3 B. & Ad. 695, where it was held, that, where a defendant in trespass against a justice for a matter done by him in the execution

of his office, pleads that he tendered to the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends.

As to the admissibility of the entry.

Without, however, resting our judgment upon this alone, let us proceed to consider whether the entries made by the deceased clerk of the plaintiffs' attornies were properly received in evidence or not. I should be extremely averse to an extension of the exception that has been engrafted upon the general rule of evidence by the decisions upon this subject; for, I am fully impressed with the great importance of not lightly admitting anything that comes before us not upon oath. These exceptions ought to be very strictly and jealously watched. The ground upon which I hold the entry in question to be evidence, is, that it charges the party by whom it is made to the extent of 100*l.* It appears that the individual referred to, in the morning of the 9th October, 1834, made an entry in his employers' day-book, to the effect that he had received 100*l.* from them for the purpose of making a tender of that sum to the defendant. No objection is made to the admissibility of that entry, because it was a direct admission on the part of the person making it that he had received the money. The second entry, which was objected to, was made in the afternoon of the same day, and is as follows:—"Re Colnaghi—Attending Mr. Lahee, tendering him 100*l.* for each of the plates and the etching of the Queen separately; when he declined to let me have same, and said he had no objection to deliver up the impressions, upon payment of the expenses of making them." If an action had been brought against the clerk by the official assignee for money had and received by him to the use of the bankrupt, the second entry would have been most material to charge him. The first entry would be evidence that the defendant had received the 100*l.*;

1837.

MARKS v. LAHEE.

and the second, that it had not been accepted by Lahee, but remained in the defendant's hands as the agent of his employers. Without, therefore, going into the question as to the course of business in the employers' office, I think the second entry was properly receivable in evidence on the same ground as the first, viz. that it was an entry of a fact within the knowledge of the deceased, and charging himself.

PARK, J.—It would be idle in me to say anything upon the first point after the very elaborate discussion we have just heard from my Lord Chief Justice, whose learning and experience in pleading so eminently qualify him for forming a correct judgment upon it. I shall, therefore, content myself with repeating, as to the materiality of the sum alleged to have been tendered, what is said upon the subject by Lord Kenyon, and by Lawrence, J., in *Grimwood* v. *Barritt*, 6 T. R. 460. "Where an averment is material," says Lord Kenyon, "the addition of a videlicet does not render it immaterial." And Lawrence, J., says: "It was necessary for the defendant to shew the real sum due on the bond, to entitle him to his set-off; and it was was decided in *Symmons* v. *Knox*, that the averment of that sum was traversable. The question here is whether the introduction of the videlicet in this case makes any difference; but it certainly does not. That it does not render an averment immaterial which without the videlicet is material, has been decided in many cases. In *Johnson* v. *Picket*, E. 25 Geo. 3, B. R., which was an action on the statute against usury, the agreement to forbear and give day of payment was stated in the declaration to be on the 14th, under a videlicet, but it was proved that the money was not advanced until the 16th; on which Lord Mansfield nonsuited the plaintiff, being of opinion that the day from whence the forbearance took place was material, though laid under a videlicet; and, on a motion for a new

trial, this court confirmed the decision at Nisi Prius. So, in the case of *Pope* v. *Foster*, 4 T. R. 590, which was an action for a malicious prosecution, the declaration stated that the indictment "afterwards, *to wit*, on the 25th of February, 1791, came on to be tried:" by the record of that indictment it appeared that the trial was on a different day, on which the plaintiff was nonsuited; and, on a motion to set aside that nonsuit, this court thought the objection fatal, "though it were laid under a videlicet, the day being material.'"

As to the admissibility of the entry.

The main question, however, is, whether the entry by the deceased clerk was admissible or not. I am clearly of opinion that it was. Although I agree that the rules of evidence are so important that they ought not to be carelessly relaxed, yet certain exceptions have necessarily been allowed, arising from the act of God. Entries made by a deceased clerk charging himself, and (if the fact be so) made in the usual and ordinary course of his employer's business, are on this ground admitted as evidence of the facts therein stated. Without entering into a consideration of the last-mentioned ground (though I incline to think that the entry in question was admissible as an entry made by the clerk in the usual course of his employment), it is enough to say that the entry is evidence, on the simple ground that it charges the party making it. The case of *Chambers* v. *Bernasconi* has no application: there, the officer was commanded to execute the writ in the county of Middlesex; the entry by him of the particular part of the county where the arrest took place was no part of his duty, and was perfectly immaterial. In *Poole* v. *Dicas*, the entry by a notary's clerk of the fact of the presentment of a bill, was held admissible, not on the ground that it charged the party making the entry, but on the ground that it was an entry made by him in the course of his duty, and of a matter that he had no interest in falsifying. But the strongest case to be found in the books upon this subject,

1837.

MARKS v. LAHEE.

is that of *Doe* d. *Patteshall* v. *Truford*, 3 B. & Ad. 890, where the entry was admitted on both grounds. And this is by no means a doctrine of modern introduction: the exception was fully considered in *Higham* v. *Ridgway*, 10 East, 109, where the judgments of Lord Ellenborough and of Grose, J., shew how anxious those learned judges were to keep within the course of the former decisions. They refer to *Warren* d. *Webb* v. *Greenville*, 2 Str. 1129, where, in order to prove a surrender of a tenant for life, the debt-book of a deceased attorney, wherein he charged for drawing and ingrossing the surrender, was received, it appearing by the book that the bill was paid. The rule is well laid down by Bayley, J., in *Higham* v. *Ridgway*: "The principle to be drawn from all the cases, beginning with *Warren* v. *Greenville*, down to *Roe* d. *Brune* v. *Rawlings*, 7 East, 279, is, that, if a person have peculiar means of knowing a fact (*a*), and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime." In the present, case, the deceased clerk who made the entry had peculiar means of knowing the fact; the entry was against his interest, inasmuch as it charged him with the receipt of a sum of money; and he might clearly have been examined as to the fact had he been living.

VAUGHAN, J.—I am of the same opinion upon both points. The question as to the admissibility of entries by deceased persons, was much discussed in *Gleadow* v. *Atkin*, 3 Tyr. 302, 1 C. & M. 410. Bayley, B., there expressly disclaims the qualification as to life-time examination. He rests the exception on the course of business, the peculiar means of knowledge of the party, and more especially the

As to the admissibility of the entry.

(*a*) An entry by a deceased person, charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. Crease v. Barrett, 1 C. M. & R. 919, 5 Tyr. 458.

1837.

MARKS v. LAHEE.

fact of the entry being against the interest of the party making it. "The declarations," he says, "of a person who, having peculiar means of knowing a particular fact, makes them against his own interest, are, after his death, admissible in evidence." In the case now under consideration, all these requisites to the validity of the evidence are found: the entry is made, in the usual course of business, by one having peculiar means of knowing the fact, with no motive to misrepresent, and, according to my view of it, directly against his own interest. With respect to the issue raised by the replication to the second plea, I am of opinion that it was not an immaterial issue. In *Hayman* v. *Gerrard*, 1 Wms. Saund. 103, n., it is said that "he that excuses a nonperformance supposes it, and the plaintiff need not shew that which the defendant has supposed and admitted." So, here, the only point in issue was as to the sufficiency of the sum tendered; the *fact* of the tender was admitted: the sum being material, it clearly could not be rendered immaterial by being stated under a videlicet.

Rule discharged.

DOE *d.* PETER and Another *v.* WATKINS.

Tuesday, Jan. 17th.

A. being desirous of raising money upon property the title deeds of which were in the hands of the defendant, who had a lien thereon, applied to C., an attorney, to procure a loan for her. An abstract was furnished to him, which he compared with the original deeds, but ultimately declined to advance the money:—Held, that C. could not be permitted to use the knowledge thus acquired by him to the defendant's prejudice.

THIS was an action of ejectment tried before Lord Denman, C. J., at the last assizes for Brecon. The lessors of the plaintiff claimed under a settlement bearing date the 30th May, 1747, made between Powell and David and Prosser. By this deed, the premises in question were, in consideration of natural love and affection &c., settled to the use of Powell and wife for life, remainder to Gwillim David, remainder to the use of William David and Powell David and his issue in tail. Gwillim David died unmar-

1837.

DOE d. PETER v. WATKINS.

ried; William David had a son, David Peter, who died on the 2nd January, 1834, without issue; Powell David had three sons—Peter, who died without issue—William, whose son William was the father of the lessor of the plaintiff Peter, whose title accrued in 1834, on the death of David Powell—and another. William David and his son David Peter, in 1784, mortgaged the property to Nicholas Rees, and in 1787 conveyed to the mortgagee the remainder of their interest therein. Under this conveyance the defendant claimed.

On the part of the defendant, it was contended that the claim of the lessors of the plaintiff, if they ever had any, was barred by the 3 & 4 Will. 4, c. 27, the 21st and 23rd sections of which were relied upon in support of the argument. The former of these clauses enacts, "that, when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period thereinbefore limited which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred." And the latter, "that, when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of an estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance,

1837.

DOE d. PETER v. WATKINS.

if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail."

His Lordship was of opinion that the statute did bar the claim of the lessors of the plaintiff: but reserved to them leave to move, should it become necessary.

In the course of the trial, an abstract was put in on the part of the lessors of the plaintiff, under the following circumstances:—One Church, a solicitor at Brecon, who was in the habit of negotiating loans upon mortgage, was applied to by a Mrs. Williams, who said she came to him on behalf of her husband for the purpose of raising money on certain property which she represented that her husband had an interest in. Church told her he must see an abstract of the title, whereupon Mrs. Williams referred him to a Mr. Jones, an attorney, who on Church's application handed over to him the abstract in question, which Church compared with the original deeds in the possession of the present defendant. Church ultimately declined to advance the money, and returned the abstract to Mrs. Williams. The defendant failing to produce the original deeds, after notice, the lessors of the plaintiff sought to make the abstract secondary evidence of their contents; and Church was called to identify it. It was submitted, on the part of the defendant, that the communication to Church being confidential, he could not be permitted to use it to the prejudice of the party. His Lordship received the evidence, reserving to the defendant leave to move to enter a nonsuit, on the ground that the abstract has been improperly received, in the event of the verdict being

1837.

DOE d. PETER v. WATKINS.

against him; or, should the verdict be for him, in the event of a rule being obtained on the part of the lessors of the plaintiff on the point already reserved. The jury found for the defendant.

Evans, in the last term, on the part of the lessors of the plaintiff, in pursuance of the leave reserved for that purpose, obtained a rule nisi to enter a verdict for them. He contended that the statute 3 & 4 Will. 4, c. 27, ss. 21 and 23, which were relied upon at the trial as operating a bar of the claim of the lessors of the plaintiff, applied only to the case of a possession *adverse* to the tenant in tail, and not to the case of a conveyance by tenant in tail, who cannot in law convey so as to create a possession adverse as against the remainder-man (*a*).

(*a*) Mr. Hayes, in the last edition (3rd) of his Introduction to Conveyancing, among other valuable remarks upon the statute in question, speaking of sections 21 and 22, observes, p. 182: "These provisions are founded on the principle, that, as the issue, remainder-man, and reversioner are all barrable by the assurance of the tenant in tail, the effect of adverse possession against him ought not to be extended to them. The result of these enactments is, that, if the time limited by the general provisions of the statute shall have run against a tenant in tail, the rights of all claimants whom the tenant in tail might have barred by his assurance will be extinct; and that, if the time shall have only commenced running against a tenant in tail, it shall continue to run against all claimants whom the tenant in tail might have barred by his assurance, who are no longer indulged with new periods for prosecuting their rights as and when such rights shall severally fall into possession; nor is allowance made for any disability under which they may labour. In effect, the tenant in tail is considered, for the purposes of this act, as representing the ownership in fee. But, as these sections can apply only to cases of *adverse* possession, they leave many titles derived under assurances by tenants in tail still exposed to the danger of eviction. Thus, if A., tenant in tail in possession, remainder to B. in fee, conveyed to C. and his heirs by fine with proclamations, thereby absolutely barring the issue in tail [32 Hen. 8, c. 36], and died, say sixty years ago, leaving issue in tail now existing, the title of C. to the fee simple is defective, inasmuch as the possession has not been and cannot be *adverse* to the issue, whose right

1837.

DOE d. PETER v. WATKINS.

Chilton now shewed cause.—The disclosure of title made to Church by Mrs. Williams was confidential, and therefore his testimony ought not to have been received. Mrs. Williams never would have applied to him had he not been a solicitor. In *Taylor* v. *Blacklow*, ante, Vol. 3, p. 614, 3 New Cases, 235, the defendant was retained as an attorney to raise money for the plaintiff by way of mortgage. In the course of his employment on this retainer, the defendant discovered that the legal estate in certain of the property intended to be comprised in the mortgage, was in the plaintiff's brother, J. H. T., whose attorney the defendant was. The defendant communicated the discovery to J. H. T., who thereupon instituted proceedings for the recovery of the premises, whereby the plaintiff was put to expense, delayed in procuring the advance he required, and ultimately compelled to pay a higher rate of interest: it was held that this was such a breach of duty on the part of the defendant as to render him liable to an action. The principle of that case was recognized and acted upon by the court of Exchequer in *Turquand* v. *Knight*, 2 M. & Welsby, 98. That was an action of trover for a lease, brought by the assignees of a bankrupt. The defendant pleaded, that, before the bankruptcy, the bankrupt deposited the lease with him as a collateral security for money which the bankrupt then owed him. At

was taken away by the fine; and the time will not begin to tell against the remainder-man until the accruer of his right to the possession by the failure of the issue in tail [ss. 2 and 3]. But, as A. was seised *in possession* at the time of levying the fine, so as to give it the force of a discontinuance, divesting the remainder and turning it to a right of action, the remainder-man would be driven to his formedon (s. 38), and reduced by the statute of non-claim [4 Hen. 7, c. 24] to the period of five years [Sed quære: see s. 38, which says "but only within the period during which by the provisions of *this* act," &c.] from the failure of issue in tail; otherwise, he might maintain an ejectment within twenty years from such failure (ss. 2 and 3), both the five years and the twenty years being susceptible of extension by disabilities (ss. 16, 17, 18)."

1837.

DOE d. PETER v. WATKINS.

the trial, the plaintiffs attempted to shew that the lease was deposited after the act of bankruptcy, and for that purpose called a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and had been applied to by him to raise him money. It was then proposed to ask him whether the bankrupt had not the lease in his possession at that time: and it was held that this was privileged from disclosure, as being a confidential communication made to him relative to his character as an attorney. Lord Abinger there said: "In this case a motion was made for a new trial on the ground of the rejection of the evidence of an attorney. The court were at the time strongly inclined to hold that the evidence had been properly rejected, but wished to look into the cases, and particularly that of *Greenough* v. *Gaskell*, 1 Mylne & K. 98, where Lord Brougham went through all the authorities. We have since done so, and we find the greater weight of authority is in favour of the rejection of the evidence. As to the point of this document being brought to the witness in his character of a scrivener, Lord Nottingham laid it down (*Harvey* v. *Clayton*, 2 Swanst. 221, n.,) that he would not compel a *scrivener* to disclose the communications made to him." And Alderson, B., added: "The rule seems to be correlative with that which governs the summary jurisdiction of the courts over attornies. In *Ex parte Aitken*, 4 B. & Ald. 49, that rule is laid down thus:—'Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But, where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction.' So, where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed

the ground of the communication, it is privileged from disclosure." It like manner it was ruled by Parke, B., in *Doe* d. *Shellard* v. *Harris*, 5 C. & P. 592, that the protection of communications made by a client to his attorney, applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity; and that an attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or an unlawful purpose. In the present case the relation of attorney and client clearly did subsist as between Church, the proposed lender, and Williams, the proposed borrower of the money. Church's evidence, therefore, ought not to have been received; and as, without it, the lessors of the plaintiff had no case, a nonsuit must be entered. [The court called upon—

Evans and *E. V. Williams* to answer to this point.—The communication was not privileged, the relation of attorney and client not subsisting as between Williams and Church. Church was the attorney of the proposed lender: Williams's attorney was Jones. The argument on the other side must go this length—that, if A. apply to B. to procure a loan for him, and B. finds the securities are invalid, the communication is privileged, though the relation of attorney and client does not exist between the parties, and the service required by the applicant is not one necessarily performed by an attorney. [*Park*, J.—The question is whether or not the proposed lender may make use of information thus obtained for the purpose of exposing any defect he may have discovered in the title submitted for investigation.] The privilege is given for the protection of the suitor, and has always been confined to communications with professional men and upon matters strictly professional. The professional character of Church was not the inducement of Mrs. Williams to apply

1837.

DOE d. PETER v. WATKINS.

to him: and the transaction itself is not one that is peculiarly the business of an attorney. [*Vaughan*, J.—Does not the rule apply to all cases where an attorney is called upon to exert his professional skill?] Supposing the rule to be so general, still here the professional skill of Church was not exerted in favour of Mrs. Williams, but adversely to her. [*Vaughan*, J.—Did not Mrs. Williams apply to Church to exert his influence as a solicitor in procuring a loan of money? *Tindal*, C. J.—In cases of this sort, there is most commonly but one professional man engaged to act for both parties. It would be dangerous to allow a party thus situated to pick holes in the title he is employed to scrutinize, and afterwards to disclose what he has discovered: it would materially detract from the security and protection that suitors are entitled to in communicating with their professional advisers.] That doctrine would apply to the present case, provided the application to Church was one having reference only to his professional character. Confessions made to clergymen, in criminal cases, are not protected (*a*): the protection only applies to

(*b*) See Rex v. Gilham, Car. C. L. 51, R. & M., C. C. R., 186. There, a prisoner committed on a charge of murder, sent for the chaplain to pray with him, who told him, that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and *that it would be important for him to confess his sins before God*, and to repair as far as he could any injury he had done. The chaplain had two interviews with the prisoner, and considered he had made a great impression on him, but distinctly *told him he did not wish him to confess*. After this the prisoner made two confessions to the gaoler and the mayor, after having been warned of the consequences by both those persons. It was held that these confessions were good evidence, and rightly received.

Roman Catholic clergymen have invariably refused to reveal matters disclosed to them in confession; and, out of respect to what the judges have been pleased to call their "prejudices," they have never been much pressed. Since, however, the recognition of the Roman Catholic religion by the 10 Geo. 4, c. 7, probably such communications, which are of the last importance to the interests of that Church, would be held to be privileged.

the case of an employment in a matter strictly professional—*Walker* v. *Wildman*, 6 Madd. 47. [*Tindal*, C. J.—Medical men are bound to reveal confidential communications made to them in their professional characters—*Rex* v. *Gibbons*, 1 C. & P. 97.] In *Bramwell* v. *Lucas*, 2 B. & C. 745, 4 D. & R. 367, Abbott, C. J., says: "Whether the privilege extends to all confidential communications between attorney and client or not, there is no doubt that it is confined to communications, and to communications to the attorney in his character of attorney." And this is not at all impugned by the rule laid down by Lord Brougham in *Greenough* v. *Gaskell*, 1 Mylne & K. 98:—"The question relates to a solicitor who is called upon to produce the entries he had made in his accounts, and letters received and written by him in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him, in that capacity. No authority sanctions such a situation of professional confidence as would be involved in compelling counsel or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of. As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation (*c*). If, touching matters *that come within the ordinary scope of professional employment*, they receive a communication in their *professional capacity*, either from a client or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if

(*c*) See Wilson v. Rastall, 4 T. R. 753, Cobden v. Kendrick, 4 T. R. 431, Wadsworth v. Hamshaw, 4 Moore, 358, n., Williams v. Mundie, R. & M. 34, 1 C. & P. 158, Proad v. Pill, 1 M. & M. 234, Clark v. Clark, 2 M. & M. 3, and Bramwell v. Lucas, 4 D. & R. 367, 2 B. & C. 745.

1837.

DOE d. PETER v. WATKINS.

they commit to paper in the course of their employment in his behalf matters *which they know only through their professional relation to their client,* they are not only *justified* in withholding such matters, but *bound* to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and, it may be, the most important of all communications—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the court issued." In *Taylor* v. *Blacklow,* the defendant had improperly conducted himself: he was guilty of a clear breach of duty towards his client. The same law would apply to the case of a scrivener, a surgeon, or any other person who had so failed in a duty which the law had cast upon him. That case, therefore, is wholly inapplicable on the present occasion. In Sugden's Vendor and Purchaser, 9th edit., Vol. 2, p. 299, it is said, that, "if an attorney put his name to an instrument as a witness, he makes himself thereby a public man, and is no longer clothed with the character of an attorney: his signature binds him to disclose all that passed at the time respecting the execution of the instrument, but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property has a right to call upon the attorney as being the attesting witness; nor does this privilege extend to communications from collateral quarters, although made to him in consequence of his character of attorney: the privilege is restricted to communications, whether oral or written, from the client to his attorney; but it is not necessary that a cause should have commenced." In *Spenceley* v. *Schulenburgh,* 7 East, 357, it was held that an attorney is bound to disclose, when

called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney. And Lord Ellenborough said "That the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him as attorney in the cause from the opposite party, in the disclosure of which there could be no breach of confidence. Here, the attorney did not even acquire his knowledge of the contents of the paper from his client, even if that would have made a difference, which might be questioned; but he received the paper himself: and his privilege of attorney (*c*) only extends to confidential communications *from his client*, and not to communications from collateral quarters, although made to him in consequence of his character of attorney."

TINDAL, C. J.—The sole question in this case is, whether or not it appears from the notes of the learned judge who tried the cause, that Church, when called to give his evidence, was speaking to a transaction in which he was acting as an attorney, that is, whether or not the relation of attorney and client existed as between him and Williams. Church being an attorney, and having money of clients to lay out on mortgage, was applied to by Mrs. Williams to procure for her husband a loan of money for the purpose of paying off Watkins, the defendant, who it seems had an incumbrance upon the property in question. Church had nothing to do with Watkins: it was Mrs. Williams who consulted and employed him; and therefore I do not perceive that he was the less her attorney in the business because the money to be advanced was the money

(*c*) See Parkhurst v. Lowten, 2 Swanst. 216.

1837.

DOE d. PETER v. WATKINS.

of another client. Church required to be furnished with an abstract of the title, and an opportunity to compare it with the original deeds in the hands of the defendant: these being furnished to him, he discovers a supposed defect which induces him to decline to advance the money, and he returns the abstract to the party from whom he received it. It appears, therefore, that there was but one professional adviser in the transaction: and there is nothing unusual in the same attorney acting both for mortgagor and mortgagee. An attorney so employed clearly has no right to disclose the communications thus made to him. Suppose the money had been advanced and the mortgage completed, a bill would no doubt have been made out by Church to Mrs. Williams, containing the charges usual in such transactions, including a quarter per cent. for procuration money. Could any one under such circumstances say that the relation of attorney and client did not subsist between the parties? Under the circumstances that did take place, I think that relation equally subsisted down to the period when the negotiation was broken off. It would be extremely dangerous and destructive of the rights of suitors to hold an attorney so situated to be at liberty to disclose to the world defects of title which he had through the confidence reposed in him been enabled to discover. The present case seems to me to fall within the principle laid down by the later authorities; and the communication in question was one that the attorney ought not to have made. The rule must be made absolute, however, for a new trial only, and not for a nonsuit, in order that the lessors of the plaintiff may have an opportunity of amending their evidence; they having the costs of the first trial if they succeed on the second.

PARK, J.—*Taylor* v. *Blacklow* seems to me precisely to meet this case. Reference is there made to Comyns's Di-

gest, "*Action on the Case for Deceit*," (A. 5), where it is laid down that such an action lies, "if a man, being intrusted in his profession, deceive him who intrusted him; or, if a man retained of counsel, become afterward of counsel with the other party in the same cause, or discover the evidence or secrets of the cause. So, if an attorney act deceptive to the prejudice of his client; as, if by collusion with the demandant he make default in a real action, whereby the land is lost." The point that has been principally urged on the part of the defendant in this case, is, that Church was not the attorney of Mrs. Williams, but of the proposed lender only. The evidence reported to us, however, clearly shews an employment by Mrs. Williams of Church in his professional character. "No one can doubt," says Tindal, C. J., in *Taylor* v. *Blacklow*, ante, Vol. 3, 631, "that it was the defendant's duty to keep sacred anything that might come to his knowledge respecting the plaintiff's title in the course of his professional employment. When the plaintiff's deeds were put into his hands for the purpose of negotiating the proposed loan, it was clearly the thing the most remote from his duty to disclose the defect to the very person who was to benefit by the disclosure. It is said that the fact of the defendant being at the time the general attorney of the party to whom and for whose benefit the communication was made, not only justified the disclosure, but rendered it the defendant's duty to make it. There may, it is true, be persons who are not possessed of sufficient discretion and firmness to adopt decided measures under such circumstances. But it appears to me, that, if the defendant felt he had conflicting duties cast upon him, his course was a safe and easy one: he should have restored the deeds to his employer, and sealed his lips with the sacred and solemn seal of silence: he would then have performed his duty." So, here, although Church was concerned for the proposed mortgagee, still he owed a duty

1837.

DOE d. PETER v. WATKINS.

to the party who employed him to raise the money, and ought not to have been permitted to disclose confidential communications made to him in consequence of his professional character. I therefore agree that there must be a new trial.

VAUGHAN, J.—I am of the same opinion. The question is, whether the relation of attorney and client subsisted between Church and Mrs. Williams. Upon the evidence as reported to us by Lord Denman, I am unable to come to any other conclusion. The privilege in question undoubtedly does not extend to the case of a divine or a physician. In a case before Lord Chief Baron Thompson, where a physician had declined to reveal matters confidentially communicated to him by a patient, that learned judge, acting upon *The Duchess of Kingston's* case, held that the communication was not privileged. The rule applies, as I apprehend, to *all cases* where an attorney is professionally consulted. In the present case, Church was employed to assist in the raising of the money, which clearly was an employment within the scope of his professional character.

Rule absolute for a new trial.

Wednesday, Jan. 18th.

JAMES *v.* SALTER and Another.

A case not comprehended within the 3rd section of the 3 & 4 Will. 4, c. 27, is not therefore excluded from the operation of the 2nd section.

REPLEVIN of chattels distrained in a dwelling-house, farm, and lands in the parish of Uffculme, in the county of Devon, on the 17th of March, 1835.

The defendants by their avowry and cognisance alleged, that the dwelling-house, farm, land, and premises in which &c. theretofore, to wit, on the 10th November,

Therefore, an annuitant claiming under a will is barred by that statute, where more than twenty years have elapsed since the right to the annuity first accrued to him, though he has *never* received any part of the annuity.

1804, were the freehold premises of one James Salter, since deceased, late father of the defendant John Salter, and continued so until and at the time of the decease of the said James Salter; that the taking of the said goods and chattels as in the declaration mentioned, was done under and in pursuance of a certain power contained in the last will and testament of the said James Salter, deceased, bearing date the 3rd of August, 1800, for raising and paying a certain annuity, yearly rent, or sum of 30*l.* given and bequeathed in and by the said will to the defendant John Salter, and charged and chargeable on the said freehold premises of James Salter, deceased; and because the sum of 870*l.*, part of the said annuity, yearly rent, or sum of 30*l.*, accruing due at Christmas-day last, was behind and unpaid for the space of twenty days after the said Christmas-day, the same having been lawfully demanded, and not paid, the defendant John Salter, in his own right avowed, and the other defendant, as bailiff to the defendant John Salter, acknowledged, the taking the said goods and chattels in the declaration mentioned, to satisfy the said arrears, according to the purport, tenor, and effect of the said will—verification.

The plaintiff pleaded in bar—secondly, that the said distress in the avowry and cognisance mentioned, was not made at any time within twenty years next after the time at which the right to make a distress for the arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant John Salter—verification. Fifthly, that it was not made within six years after the said arrears in respect of the said annuity, yearly rent, or sum of 30*l.*, first became due—verification.

To the second plea, the defendants replied, that, so far as the same related to 585*l.*, part of the money in the avowry and cognisance mentioned, the distress was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every

1837.

JAMES v. SALTER.

part thereof, being the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant Salter: and, as to the residue of the second plea in bar, so far as the same related to the residue of the money in the avowry and cognisance mentioned, the defendants relinquished their avowry and cognisance and prayer of judgment, so far as the same related thereto. To the fifth plea, the defendants replied, that the distress was made within six years next after the arrears in respect of the annuity, yearly rent, or sum of 30*l.* first became due.

The jury, in a special verdict, set out the will of James Salter, the father of the defendant John Salter, by which it appeared, that he had charged his freehold property with the annuity set forth in the avowry. They then found that the said James Salter, the father of the defendant John Salter, died in the year 1804, without having revoked or altered his said will; that, on the 17th March, 1835, the defendant John Salter, and the other defendant Facey, as his bailiff, took the goods and chattels in the declaration mentioned as for and in the name of a distress for the sum of 870*l.* for twenty-nine years' arrears of the said annuity, or yearly rent or sum of 30*l.*, ending at Christmas, 1834; and that the defendant John Salter never received any part of the said annuity.

The case was argued in Michaelmas Term by—

Crowder, for the plaintiff.—The question is whether the avowant in this case was entitled to distrain for the whole arrears of the annuity, or whether his claim is barred by the lapse of twenty years. The court, on a former occasion, held that the case did not fall within the 3 & 4 Will. 4, c. 27—ante, Vol. 2, p. 750: but that can hardly be said to be an authority, the precise point not having been presented for judgment.

By the 1st section of that statute, it is enacted that "the word 'rent' shall extend to all heriots, and all

services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole);" and, by the 2nd, it is enacted, "that, after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." If that section had stood alone, the avowant had been unquestionably barred; but it will be contended that that section must be taken in conjunction with the 3rd, which enacts, "that, in the construction of this act, the right to make an entry or distress or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; that is to say—1. When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, or in receipt of such land, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any profits or rent were or was so received.—2. And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the

1837.

JAMES v. SALTER.

last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.—3. And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.—4. And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.—5. And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken." The 2nd section clearly embraces this case; and there is nothing in the 3rd section to exclude it from the operation of the second. It will be contended on the other side, as was contended on the former occasion, that this case can only, if at all, fall within the 3rd branch of section 3, and that dispositions by will are expressly excluded from the operation of that clause. It by no means follows, however, that, because the case is

not within the 3rd section, it is therefore also excluded from the 2nd, the language of which is sufficiently large to include it. The 3rd section professes to give a rule of construction to the second: but the legislature do not profess to specify therein all the instances to which its language would apply. The right in such a case as the present accrues from the death of the testator. [*Tindal*, C. J.—Suppose the case of a will concealed for more than twenty years after the testator's death.] Such a case might happen, and a particular hardship would be entailed upon the party by the construction now contended for: but the inconvenience of disturbing old titles would be infinitely greater. [*Tindal*, C. J.—What sense do you give to the words "other than by will"?] All that can be said is, that the legislature were not considering the case of a will. A deed operates from the date of its execution; a will, from the death of the testator: that is reason enough for excluding the case of a will from the 3rd section. The words "or other future estate or interest," in the fourth branch of the 3rd section, are also sufficient to embrace the present case. At the time of making the will, the interest in question was a future interest, to come into possession at the death of the testator; and therefore the estate or interest of the avowant in this case clearly accrued at the time of the death of James Salter. The 40th section provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the

1837.

JAMES v. SALTER.

person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given." The word "rent" in the statute includes annuities; and a legacy is in the nature of an annuity: the legislature, therefore, clearly meant to apply the same limitation to claims under wills as to claims under deeds.

The avowant's claim is at all events limited to six years' arrears by the 42nd section, which enacts "that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." The present case cannot be held not to be within the 42nd section, without impugning the decision of this court in *Paget* v. *Foley*, ante, Vol. 3, p. 120, 2 New Cases, 679. There, the court were divided in opinion as to whether or not the limitation imposed by that section applied to an action of covenant for arrears of rent accruing under an indenture: but they were unanimous in holding the limitation in such case to be governed by the 3 & 4 Will. 4, c. 42, s. 3, the latter being virtually a repeal of the former enactment. [*Bosanquet*, J.—The 42nd section applies only to charges by specialty.]

Butt, contra.—The court will gather the intention of the legislature from the words of the act; and there the intention will be found clearly and unambiguously ex-

pressed. If this case fell within the 40th section, it clearly could not fall within the 2nd. The 40th section, however, has no application to the case of a rent, but to that of a principal sum charged upon land. Taking the 2nd section either alone or in conjunction with the 3rd, it operates no bar to the claim of the avowant. If the 2nd section stood alone, it would be no bar to the arrears, for the reasons urged on the former occasion—ante, Vol. 2, 750: the limitation in this case is still the old limitation of forty years if the rent were created by a deed—Com. Dig. *Temps*, (G.)—or the common law presumption that the rent has been paid, after a lapse of twenty years. That clause, however, must receive its exposition by the 3rd section, which explains the meaning of the expression "the first accrual of the right." By that the case of a will is in terms excluded: and justly; for, a party may have an annuity left him by a will, of which he may have received no notice for more than twenty years after his right to receive the first payment in respect of it accrued to him. The 4th instance mentioned in the 3rd section is satisfied by a rent-charge to one for twenty years, and, after that, to another: it applies to cases of reversion or remainder only.

The 42nd section was intended to apply to conventional rents by parol, and not to rent-charges created by will. The whole difficulty in the case arises from confounding those clauses of the statute that bar the *estate* with those that bar the *arrears* only. The 5th plea, however, is not properly framed under the 42nd section. The arrears avowed for are, all the arrears accruing within twenty years. The plaintiff should have pleaded, not a bar to the whole estate, as he has done, but as to all the arrears except those accruing within the last six years. Upon that issue, at all events, the defendants are entitled to judgment. [*Tindal*, C. J.—I have great doubt whether the avowant would be entitled to more than six years,

1837.

JAMES v. SALTER.

upon a plea properly framed to raise the point.] It is enough for the court to say that the issues raised have not been proved.

Crowder, in reply.—The 5th plea is properly pleaded under section 42, as a bar to the arrears.—With respect to the other issue—If the 2nd section had stood alone, no doubt could have been entertained: the right of the avowant clearly first accrued at the death of the testator, James Salter. If the third branch of the 3rd section had been omitted, the case would have been equally clear. Under a liberal construction, the case might be held to fall within the fourth branch of the last-mentioned clause.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—The question which has been argued before us arises upon a special verdict found on the second and last issues raised between the parties to this action: the second issue being upon the question "whether the distress, so far as relates to 585*l.*, part of the money in the avowry and cognisance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant John Salter;" and the last issue being upon the question "whether the distress in the avowry and cognisance mentioned was made at any time within six years next after the arrears in respect of the said annuity, yearly rent, or sum of 30*l.* first became due." Of these two issues, the first appears to us to be the principal, and, indeed, the only important one; for, if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant John Salter to the annuity is altogether barred; and he cannot, in any view of the case, be allowed to recover the arrears for the last six years, to

1837.

JAMES v. SALTER.

which only the pleadings on which the last issue is raised can be held to apply.

The facts which are found by the special verdict on the two issues, are few and simple:—That James Salter, the father of the defendant John Salter, by his will duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to John Salter, the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.*, by four quarterly payments, to commence on the first quarterly day of payment after his decease; with a power of distress if the annuity should be in arrear for twenty days next after any quarterly day of payment; that the testator died in 1804, without having revoked or altered his will; and that, on the 17th March, 1835, the defendants distrained for 870*l.*, for twenty-nine years' arrears of the annuity, ending at Christmas, 1834.

Upon this state of facts, it appears that the right to make a distress for the annuity first accrued to John Salter, the son, on the expiration of the twenty days next after the first quarterly day of payment subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appears, that, so far as there is any allegation on the record, or any finding by the jury, there was no payment or receipt of the annuity by the defendant John Salter before the distress was put in in March, 1835; for, it was then put in by the defendant for the whole of the arrears since the death of the testator. And, although the defendant has, by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact appearing upon the record, that no distress was made for twenty-nine years after the right to distrain first accrued.

Now, upon reference to the statute 3 & 4 Will. 4, c. 27,

1837.

JAMES v. SALTER.

it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made, the two periods being prescribed in respect of claims and objects in their own nature perfectly distinct. The 2nd section contemplates and provides for the case where the right or title to the annuity itself is disputed, and directs "that no person shall make a distress for any rent but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same." The 42nd section contemplates and provides for the case where the title to the annuity is not disputed, but the distress is made for arrears due; and, for that purpose, directs "that no arrears of rent shall be recovered by any distress but within six years next after the same respectively shall have become due." The second issue arises upon a plea in bar framed upon the 2nd section; the last issue arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the 42nd section.

As to the second issue.

Now, with respect to the second issue, it is manifest that the facts found in the special verdict will bring the case precisely within the provision of the 2nd section of the act, unless that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the 3rd section does in terms exclude from the operation of the 2nd the claim of any person whose right to a rent is derived under a will, by reason of the words "other than by will" which are found in the 3rd section. And when this case was originally before the court upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the judges then in court, that the present case was excluded from the operation of the 2nd section by reason of its not being comprehended within the third; which 3rd section appeared to us, upon a more hasty view, to contain an enu-

meration of instances to which only the 2nd section could be held to be applicable. For myself, however, I am ready to admit, and I am authorised at the same time to say the same for my three Brethren who were then in court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed; and that we think (in which my brother Vaughan entirely concurs with us) that this case is governed by the 2nd section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity.

That the case must have been governed by the 2nd section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the 3rd section, the object and intent of it seem to us to be no more than this—to explain and give a construction to the enactment contained in the 2nd clause as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the 2nd section, but is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the 3rd section should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention. But, in this section, there are no words that can be said directly to exclude all instances except those enumerated in the 3rd section. Again, if the words "granted by any instrument other than by will" were to be held to prevent the application of the statutory limita-

1837.

JAMES v. SALTER.

tion of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute; for, the instance in the 3rd section immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, "or other future estates or interests," is large enough to comprehend and would comprehend all executory devises; and, again, section 40 expressly provides for the case of any legacy. And, indeed, the words "by any instrument other than by will" carry the matter no further than if the 3rd section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case, not being enumerated in the 3rd section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz., the devise of an estate in possession in land, or of an estate in possession in a rent charge first created by the will, would be altogether unprovided for by the statute. For, the third class of instances enumerated in section 3 describes the grant to be "by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent," a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent; for, the devisor who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee; still less can the devisor who creates a new rent-charge by his will be said to have been in the receipt of the rent. The case, therefore, under discussion, not falling within the 3rd section, but falling within the clear and unambiguous terms of the

second, we hold it to be governed thereby; that the claim and title of the defendant John Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff.

As to the last issue, founded upon the limitation of six years given by the 42nd section of the statute, it becomes of little importance whether the verdict thereon be entered for the plaintiff or the defendant, any further than as the costs dependent on that issue are affected by such finding; for, there being but one avowry, and the plaintiff being entitled to judgment on the issue raised on one of his pleas in bar, the avowant's claim to a return of the cattle &c. is completely barred, whatever may become of the other pleas in bar. Now, taking the last issue as if it stood alone, which appears to be the correct mode of considering the question, and applying thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due; for, upon the last issue, there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years. We therefore think the verdict on the last issue must be entered for the defendant; but that upon the whole record the judgment must be for the plaintiff.

Judgment for the plaintiff.

1837.

PONTET, Surviving Executor of JOSEPH GAILLARD, Deceased, *v.* The Company of Proprietors of The BASINGSTOKE CANAL NAVIGATION.

Wednesday, Jan. 18th.

By a canal act the company were empowered to borrow and take up money upon the credit of the undertaking and the rates or duties made payable by the act, and by writing under their common seal to mortgage or assign over the undertaking and the rates or duties to the persons advancing the money, as a security for the money so borrowed; and a form of mortgage was given, whereby the company engaged to pay the interest half-yearly:—Held, that the property of the company and the rates or duties alone were pledged for the payment of the monies advanced; and that the proprietors were not liable to be sued in covenant for arrears of interest.

THE first count of the declaration stated that the defendants, theretofore, to wit, on the 26th September, 1793, according to the statute in such case made and provided, made their deed poll, sealed with their common seal, and now shewn to the court here (the date whereof was the day and year aforesaid), and thereby made known to all to whom those presents should come, that, in pursuance and by virtue of an act of parliament made and passed in the 33rd year of the reign of George 3, intituled "an act for effectually carrying into execution an act of parliament of the 18th year of the reign of his present Majesty, for making a navigable canal from the town of Basingstoke in the county of Southampton," &c., and also of an order made at a general assembly or meeting of the said company of proprietors, held at &c., on the 15th April, 1793, and in consideration of the sum of 100*l.* to them advanced and paid by Joseph Gaillard, the receipt whereof was thereby acknowledged, the said company of proprietors had granted and assigned, and by that present instrument or writing under their common seal, did grant and assign, unto the said Joseph Gaillard, his executors, administrators, and assigns, all that the said navigation and undertaking, and the rates or duties granted and made payable by the said act of the 18th year of the reign of his majesty, and all their property, estate, right, and interest therein; to hold the same unto the said Joseph Gaillard, his executors, administrators, and assigns, until the said sum of 100*l.*, together with interest for the same at the rate of 5*l.* per centum per annum, to commence from the 24th day of June then last past, *and to be paid half yearly*, that is to

1837.

PONTET v. BASINGSTOKE Canal Co.

say, on the 25th day of December and the 24th day of June in every year, should be fully repaid and satisfied.

The declaration contained a second and third count upon two similar deeds poll. Breach—that, after the making of the said several deeds, the defendants did not keep their covenant in each of the same, in this, to wit, that the interest on the said several sums was not paid according to the said several deeds; and that, on the contrary thereof, afterwards, to wit, on the 25th day of December, 1834, a large sum of money, to wit, the sum of 95*l.*, became and was due and in arrear for interest upon each of the said sums, for a large space of time, to wit, the space of nineteen years before then elapsed, contrary to the force and effect of the said several deeds, and the covenant in each contained: to the damage of the plaintiff, as such surviving executor, of 500*l.* &c.—profert of probate.

The defendants pleaded, to the first count of the declaration—first, that the said deed poll in that count mentioned was made and executed by virtue of an order of certain proprietors of the Basingstoke Canal Navigation assembled together on a certain day and year, to wit, the 15th April, 1793, by which said order the last-mentioned proprietors declared that the sum of 30,000*l.*, part of the 60,000*l.* mentioned in the 33 Geo. 3, should be borrowed and taken up at interest *upon the credit of the said undertaking*, and the rates and duties granted and made payable by the said act made and passed in the 18th year of the reign of his said late majesty; and that the said last-mentioned meeting was not a general assembly or meeting, or a special meeting of the said company of proprietors duly convened and held under and by virtue of and pursuant to the statute in such case made and provided; nor was the same meeting a general assembly or meeting, or a special meeting of the said company of proprietors duly held by adjournment under and pursuant to the sta-

1837.

PONTET v. BASINGSTOKE Canal Co.

tute in that behalf; wherefore the said supposed deed poll was void in law—verification.

Secondly, that the said deed poll therein mentioned was made and executed by them the defendants for the purpose of securing to the said Joseph Gaillard therein named, the repayment of a certain sum of money, to wit, 100*l.*, borrowed by them of him for the purposes specified in and by the said act made and passed in the 33 Geo. 3, and interest thereon; that the said deed poll was made and executed by the defendants pursuant to the provisions in that act contained; by reason whereof Joseph Gaillard became and was, and the plaintiff, as surviving executor as aforesaid, still was, entitled to all the privileges and benefits of a claim or lien on the navigation and undertaking, rates and duties, in the said act of the 18 Geo. 3 mentioned; that the defendants had in like manner borrowed from divers other persons divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 54,270*l.*, and had executed mortgages or assignments for securing the repayment of the same, with interest, for the purposes of, and pursuant to, the said act of the 33 Geo. 3; that the said last-mentioned sum of money still remained due and unpaid, and that the said last-mentioned persons, their executors, administrators and assigns, before and at the time of the commencement of this suit, were, and still are, entitled to a lien on the said navigation and undertaking, rates and duties, together with the plaintiff, as executor as aforesaid; that the whole assets and property of them the defendants were insufficient to pay and satisfy the said sum of money and interest in the deed poll in the first count mentioned, and the said other sums of money so borrowed by the defendants as in this plea mentioned, and interest thereon; and that, if the plaintiff should succeed in obtaining a judgment in this suit against the defendants, he would thereby obtain a priority over the said other cre-

ditors of the defendants, contrary to the form of the statute in such case made and provided (*a*)—verification.

Thirdly, as to the nonpayment of all the said arrears of interest accrued due on the said deed poll in the said first count mentioned, except such arrears thereof as became due within six years next before the commencement of this suit, that this suit was commenced after the 31st December, 1833, and that the said supposed causes of action as to the said arrears of interest in the introductory part of this plea mentioned, except as therein mentioned, did not, nor did any or either of them, accrue at any time within six years next before the commencement of this suit, in manner and form as the plaintiff had above thereof complained against the defendants: and this the defendants were ready to verify, &c.; wherefore they prayed judg-

(*a*) By the statute 33 Geo. 3, c. xvi, s. 1, it is enacted, "That it shall be lawful for the said company of proprietors, and they are hereby empowered from time to time, by virtue of an order made at any general assembly or meeting of the said company of proproprietors, to borrow and take up, at legal or less interest, any sum or sums of money *upon the credit of the said undertaking, and the rates and duties granted and made payable by the said act* [18 Geo. 3, c. lxxv.]; and by writing under their common seal to mortgage and assign over the said undertaking, and the said rates or duties, to the person or persons who shall advance or lend such money, or his or their trustee or trustees, as a security for the money so to be borrowed, together with interest for the same."

The 3rd section provides, "That the whole of the money to be raised by virtue of the act shall not exceed the sum of 60,000*l.*; and all persons to whom any such mortgages or assignments, or grants of annuity as aforesaid shall be made, or who shall be entitled to the money thereby secured, shall be creditors on the said rates or duties in equal degree one with another; and no preference shall be given to any such creditors in respect to the priority of advancing their money, or the dates of their securities; and that the interest of the money to be borrowed, and the annuities to be granted as aforesaid, shall from time to time be paid half yearly to the several persons entitled thereto, in preference to any interest or dividends due or payable by the said company of proprietors, by virtue of the said recited act."

1837.

PONTET v. BASINGSTOKE Canal Co.

ment if the plaintiff ought to have or maintain his aforesaid action against them in respect of the premises in the introductory part of that plea mentioned, &c.

The fourth plea (to the second count), and the seventh plea (to the third count), were similar to the first plea.

The fifth plea (to the second count), and the eighth plea (to the third count), were similar to the second plea.

The sixth plea (to the second count), and the ninth plea (to the third count), were similar to the third plea.

The plaintiff demurred specially to the first, fourth, and seventh pleas, assigning for causes—as to the first plea—that it did not appear by that plea in respect of what fact or for what reason the general assembly or meeting described in the deed poll was otherwise than pursuant to the statute—as to the fourth and seventh pleas—that it did not appear by either of those pleas in respect of what fact or for what reason the order mentioned in the deeds poll was made at a meeting or assembly otherwise than pursuant to the statute—and, as to each of the said pleas—that the defendants were estopped by the deeds set out in the declaration from pleading the facts set out in the said several pleas.

There was also a special demurrer to the second, fifth, and eighth pleas: the causes assigned were—that it did not appear by either of those pleas to whom or to how many persons, or for what sums, or when, either of the assignments or mortgages in those pleas mentioned was executed, nor whether either of them was executed by virtue of any order as prescribed by the statute.

And there was a general demurrer to the third, sixth, and ninth pleas.

The defendants joined in demurrer.

The points marked for argument on the part of the plaintiff were—as to the demurrer to the second, fifth, and eighth pleas, that the facts stated in each of those pleas went merely to exclude any right of priority between

the different creditors in respect of their lien upon the undertaking and the rates, and did not go to the right of action—and, as to the demurrer to the third, sixth, and ninth pleas, that the arrears of interest were not within the meaning of the 3 & 4 Will. 4, c. 27, s. 42, upon which those pleas proceeded. With respect to the demurrer to the first, fourth, and seventh pleas, the plaintiff relied upon the special causes of demurrer assigned.

The points for argument on the part of the defendants were—that the several deeds poll set forth in the declaration, being made pursuant to the statute in such case made and provided, conferred on the testator interests or estates by way of assignment or mortgage in the navigation and undertaking, rates, and duties, therein mentioned, for securing the principal sums advanced by him to the defendants, and interest thereon, without any agreement on the part of the defendants for repayment; and that the deeds did not contain any covenant, express or implied, on the part of the defendants for payment of interest on the said principal sums.

The real question between the parties was, as to the nature of the securities. *Erle*, for the defendants, admitted that he could not support the third, sixth, and ninth pleas.

Barstow, in support of the demurrers.—With respect to the principal money lent, the company's deed poll only gave the testator a mortgage security on the property and profits of the canal; but, with respect to the interest, the words "to be paid half-yearly" constitute a covenant on the part of the proprietors to pay it, on which they are liable to be sued. No express form of words is necessary to make a covenant. In Comyns's Digest, *Covenant* (A. 2.), it is said: "Any words in a deed which shew an

1837.

PONTET v. BASINGSTOKE Canal Co.

agreement to do a thing, make a covenant; as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo proinde the interest to A., covenant lies against B. for the interest." Here the intention of the parties to bind themselves is clear. The words "to be paid half-yearly" have no meaning unless they imply a covenant on the part of the company to make the payment at that interval. [*Tindal*, C. J.—The form of the deed poll is given by the 33 Geo. 3, c. xvi.] The words of the act are somewhat extended in the deeds: the days whereon the interest is to be payable are added. [*Tindal*, C. J.—I think you must go the length of shewing that the company are liable for the principal.] As to that the undertaking only clearly are liable. [*Tindal*, C. J.—How are we to extract from the words of the legislature a different meaning when speaking of principal and of interest, the same expressions being used as to both?] As regards the principal, no time for payment is expressed: as to the interest, it is. "If there are articles of agreement between A. and B., by which it is agreed, upon a marriage intended between A. and C., that all the stock of C. shall remain in the hands of B. till A. shall make a certain jointure to C., ipso B. annuatim solvendo to A. interesse proinde secundum ratum 8*l.* per centum &c. If B. does not pay the said interest, an action of covenant lies against him upon these words, because every agreement by deed is a covenant, otherwise A. shall not have any remedy for the money"—Vin. Abr. *Covenant* (C), 7—Roll. Abr. 518—Bac. Abr. *Covenant*, Vol. 2, 339.

TINDAL, C. J.—If this had been a demurrer to the declaration, we should have looked into these acts of parliament, which are declared public, and we should have seen that these deeds were executed in pursuance of the statutory power conferred upon the company. The 33 Geo. 3, c. xvi,

for the first time authorizes them to take up money on the credit of the undertaking, and the rates and duties made payable by the act. The third section provides that "all persons to whom any such mortgages or assignments or grants of annuity as aforesaid shall be made, or who shall be entitled to the money thereby secured, shall be creditors on the said rates or duties in equal degree one with another; and no preference shall be given to any such creditors in respect to the priority of advancing their money, or the dates of their securities; and that the interest of the money to be borrowed, and the annuities to be granted as aforesaid, shall from time to time be paid half yearly to the several persons entitled thereto, in preference to any interest or dividends due or payable by the said company of proprietors by virtue of the recited act"—18 Geo. 3, c. lxxv. Upon the best view that I can take of the acts of parliament, I think it never was intended that these securities should give any right of action against the proprietors in a court of law. During the last fifty years, canal acts out of number have passed; but nobody ever heard of an action against the proprietors for the interest of money advanced on the credit of the undertaking. It would be the ruin of undertakings of this nature if the proprietors were to be personally liable. When, therefore, it is enacted "that it shall be lawful for the said company of proprietors, and they are hereby empowered from time to time, by virtue of an order made at any general assembly or meeting of the said company of proprietors, to borrow and take up, at legal or less interest, any sum or sums of money *upon the credit of the said undertaking and the rates or duties granted and made payable by the said act*, and by writing under their common seal to mortgage or assign over the said undertaking and the said rates or duties to the person or persons who shall advance or lend such money, or his or their trustee or trustees, as a security for the money so to be borrowed, together with inte-

1837.

PONTET v. BASINGSTOKE Canal Co.

rest for the same," I think the terms of the contract are satisfied by giving the lenders of money a security on the undertaking, without allowing them to sue the corporation. The remedy would be by entering on the property of the company. A different course would give one party an advantage over the rest of the creditors of the company, which is expressly prohibited by the act. The lenders must float with the canal.

VAUGHAN, J. (*b*).—I am of the same opinion. The third section shews that it was not in the contemplation of the legislature that the individual members of the company should be subject to actions. The canal itself is the only security for interest as well as principal.

Judgment for the defendants.

(*b*) PARK, J., was absent on account of indisposition.

Wednesday, Jan. 18*th.*

In assumpsit on a charterparty by which the defendant engaged, amongst other things, to pay a given sum per month for the hire of the vessel and to provide a homeward cargo, with an indebitatus count for freight, and a count upon an account stated, the plaintiff assigned for breaches—first, that the defendant neglected to provide a homeward cargo—secondly, the non-payment of 200*l.* alleged to be due for four months' freight—thirdly, the non-payment of 200*l.* claimed by the indebitatus count for freight, and other 200*l.* claimed to be due on the account stated; concluding "to the plaintiff's damage of 300*l.*" The defendant pleaded, as to 476*l.*, parcel of the sums of money in the declaration mentioned, payment of that sum to the plaintiff before action brought, in full satisfaction and discharge of all the damages sustained by him as to that sum; and that the plaintiff accepted and received it in full satisfaction and discharge of such damages:—Held, bad on special demurrer; the plea not shewing in respect of what particular items of the plaintiff's demand the payments had been made.

LORYMER *v.* VIZEU.

ASSUMPSIT on a charterparty. The first count of the declaration stated that theretofore, to wit, on the 27th September, 1832, by a certain charterparty of affreightment then made, it was mutually agreed by and between the plaintiff by one T. J., the agent of the plaintiff in that behalf, and the defendant, that the ship Kara, of the burthen of one hundred and thirty-seven tons or thereabouts, being tight, &c., should with all convenient speed

receive whatever goods might be sent alongside consistently with the laws of this country as well as of those of the respective ports to which she might be consigned, and proceed therewith to one or more of the Western Islands, and, after the discharge of the same or any part thereof, proceed thence to any port or ports not to the southward of the Cape de Verd Islands, for all purposes of loading, unloading, and reloading such lawful merchandize as might be sent alongside, and finally to be discharged in the United Kingdom, not exceeding what she could reasonably stow and carry over and above her cabin tackle, provisions, and furniture, and deliver the same agreeably to bills of lading, and so end the voyage (restraint of princes and rulers, the dangers of the seas and navigation, fire, pirates, and enemies during the said voyage always mutually excepted): And the defendant did also in the said charterparty promise and agree to load the said vessel with the said cargo as therein was mentioned, and also to ceive the same at her port of delivery as therein stated; and also that the defendant should and would pay freight at and after the rate and in the manner in the said charterparty mentioned, to wit, at and after the rate of one hundred and ten pounds per calendar month for each and every calendar month the said vessel might be occupied in prosecuting the above-named voyage, and in like proportion for any number of days: it being understood and agreed (as in the said charterparty mentioned) that the said vessel was to receive pay for three months certain, the same to commence from the 5th October then next ensuing: the charterers to have the entire use of the hold and cabin, allowing accommodations in the latter for the master: the charterers to pay all port charges during the voyages, as also the expense of ballasting the ship in London: the pilotages to be paid by the ship: And it was also thereby further agreed between the same parties respectively that the payments in the said charterparty men-

1837.

LORYMER v. VIZEU.

tioned should be made as follows; that is to say, one month's advance previous to sailing, sufficient cash for the said ship's disbursements at each respective port, and the remainder in cash when discharged in the United Kingdom as in the said charterparty was in that behalf expressed: And it was also thereby further agreed between the plaintiff and defendant, that, should the vessel meet with any accident during the performance of the said agreement, the time occupied in repairing the said vessel should be deducted by the charterers; and also that, should the said vessel be occupied more than four months without returning to the United Kingdom, the freight up to that period should be settled abroad: [Mutual promises—averment that the ship was tight, &c.: that she received a cargo on board, and proceeded to St. Michael's, and, under the defendant's direction, made several voyages between that place and Terciera and Oporto; and that she finally returned to St. Michael's on the 15th March, 1833]: And the plaintiff in fact said that the said captain or master, as such agent as aforesaid, after the making of the charterparty, did at each and every of the said ports and places respectively well and truly receive, load, carry, convey, unload, discharge, and deliver, according to the several directions of the defendant in that behalf, all such goods and merchandizes respectively as were from time to time sent alongside the said ship, as the same were respectively directed and required, according to the tenor and effect, true intent, and meaning of the said charterparty: and, although the said captain or master, as such agent as aforesaid, was afterwards, to wit, on the day and year last aforesaid, from the time of his arrival with the said ship at the said island of St. Michael's as last aforesaid, ready and willing to receive at the same island or elsewhere within the meaning of the said charterparty, and also to carry and convey, discharge, and deliver all such other goods and merchandizes as might be sent alongside

1837.

LORYMER v. VIZEU.

the said ship according to the tenor and effect, true intent, and meaning of the said charterparty, whereof the defendant then, to wit, on the day and year last aforesaid, had notice; and although the defendant was afterwards, to wit, on the day and year last aforesaid, at the said island of St. Michael's, requested by the said captain or master, as the agent and on the behalf of the plaintiff, to send alongside and load on board the said ship a proper and sufficient cargo of goods and merchandize, in order that the said captain or master might proceed therewith to such port or ports as might be necessary in the prosecution and completion of the said voyage, according to the tenor and effect, true intent and meaning of the said charterparty: Yet the defendant, not regarding his promise and undertaking in that behalf, did not nor would then or at any time afterwards send alongside or load on board the said ship at the said island of St. Michael's or elsewhere a proper and sufficient cargo or any cargo of goods and merchandize, so as to enable the said captain or master to proceed therewith on and in the prosecution and completion of the said voyage, according to the tenor and effect, true intent and meaning of the said charterparty; but the defendant then wholly neglected and refused so to do, and hath since wholly neglected and refused so to do: And the plaintiff in fact further said, that, although the said ship had been then, to wit, on the day and year last aforesaid, occupied in the said voyage, by the direction of and also for the said defendant, more than four months without returning to the United Kingdom, and by reason thereof a large sum, to wit, the sum of 200*l.*, was then, to wit, on &c. last aforesaid, due and payable to the plaintiff for the freight of the said vessel, and ought then to have been settled, paid, and discharged by the defendant for and on the account of the plaintiff through the agents of the plaintiff and defendant respectively abroad, according to the tenor and effect of the said charterparty: Yet the

First breach.

Second breach.

1837.

LORYMER v. VIZEU.

defendant, further disregarding his promise and undertaking in that behalf, did not nor would settle, pay, or discharge the said sum of money, or any part thereof, or cause the same or any part thereof to be settled, paid, or discharged for or on account of the plaintiff, according to the tenor and effect, true intent and meaning of the said charterparty, but then wholly neglected and refused so to do, although the said T. J., as agent of the plaintiff in that behalf, was ready and willing and then offered to receive the same for and on account of the plaintiff, whereof the defendant then, to wit, on &c. last aforesaid, had notice: By reason of which said several premises respectively the plaintiff had not only been hindered and prevented from having the said voyage so agreed upon as aforesaid duly completed according to the tenor and effect, true intent and meaning of the said charterparty, and the same had been thereby left wholly incomplete and unfinished; but the plaintiff had also been hindered and prevented from receiving the due payment of the freight so stipulated and agreed upon as aforesaid, and the same was still wholly unpaid and unsatisfied, contrary to the tenor and effect, true intent and meaning of the said charterparty; and the plaintiff had been and was by means of the premises otherwise greatly injured and aggrieved.

The second count was a general indebitatus assumpsit, claiming 200*l.* for freight for the carriage and conveyance of goods and merchandize; and the third a count upon an account stated, claiming the like sum of 200*l.* as due thereon: Breach—that the defendant had not paid the last-mentioned two several sums of money, or any or either of them, or any part thereof: to the damage of the plaintiff of 300*l.*

Third breach.

Plea.

The defendant pleaded, amongst others—as to the sum of 476*l.* 14*s.* 7*d.*, parcel of the said several sums of money in the declaration mentioned—that, before the commencement of this suit, to wit, on the day and year first afore-

said, and on divers other days between that day and the commencement of this suit, he paid to the plaintiff divers monies amounting in the whole to the said sum of 476*l.* 14*s.* 7*d.*, in full satisfaction and discharge of all the damages by the plaintiff sustained on occasion of the non-performance of the said promises as to the said sum of 476*l.* 14*s.* 7*d.*, parcel of the said several sums of money in the declaration mentioned; and the plaintiff then accepted and received the said sum of 476*l.* 14*s.* 7*d.* in full satisfaction and discharge of such damages—verification.

To this plea the plaintiff demurred; assigning for causes, that it did not sufficiently appear in or by the said plea in respect of what counts or parts of the declaration the same was pleaded, or whether the sum of money therein alleged to have been paid was paid in satisfaction and discharge of all the several causes of action in the declaration mentioned or some of those causes only, or, if of some only, in respect of which of those causes of action; and by reason thereof the plaintiff was wholly prevented from replying to the said plea with any sufficient certainty —that the said plea was defective in this, that it did not sufficiently shew when the said sum of money therein mentioned was paid—that the said plea was irrelevant and an insufficient answer to any of the causes of action in the declaration mentioned, inasmuch as the payment therein mentioned was alleged to have been made before the defendant had committed any breach of any of his promises as in the declaration mentioned, the words "the day and year first aforesaid" referring to the time of the making of the said charter-party in the first count mentioned—that the said plea was pleaded to the damages only, and not in bar of any part of the action—and also that the said plea was in other respects untechnical, informal, and insufficient. Special demurrer.

The defendant joined in demurrer. The case was first argued, in Michaelmas Term last, when—

1837.

LORYMER v. VIZEU.

Erle, in support of the demurrer, contended that the plea was bad, it being left in doubt whether the alleged payment of 467*l.* 14*s.* 7*d.* was pleaded to the first breach, the not finding a cargo at St. Michael's, as to which no *sum* was mentioned in the count. He relied upon the case of *Mee* v. *Tomlinson*, 5 Nev. & M. 624, where the plaintiff declared, first for work and labour, secondly for money paid, and thirdly for money due upon an account stated; a plea alleging that 20*l.*, parcel of the sum mentioned in the third count, and 20*l.*, parcel of the several sums demanded in the first and second counts, are one and the same debt of 20*l.*, and not distinct debts of 20*l.*, was held bad, on special demurrer, for not shewing how much of the 20*l.* admitted to be due on the first two counts, was admitted to be so due on each of those two counts separately.

[The Court suggested to *Whately*, who was to have supported the plea, that he had better amend, by shewing how much of the 476*l.* 14*s.* 7*d.* the defendant meant to apply to the unliquidated, and how much to the liquidated, damages claimed by the declaration. *Whateley* at first acceded to the suggestion of the Court; but, on a subsequent day, he obtained leave to restore the case to the demurrer paper.]

Whateley, in support of the plea.—The question is whether it be not sufficient to plead payment generally on account, according to the fact, without shewing on account of what particular items of the plaintiff's demand the payment is supposed to have been made. The plea of tender is always in this form, and is in every respect analogous to the plea of payment. Suppose the defendant were indebted to the plaintiff on two accounts—in respect of freight, and on an account stated; and, before the commencement of the action, the defendant pays a sum of money generally on account. The payer having made no

1837.

LORYMER v. VIZEU.

specific appropriation, the receiver would, according to the doctrine first established in *Clayton's* case, 1 Meriv. 608, have a right to appropriate it to either demand. Suppose he applies it to the debt due for freight, of which the defendant could have no knowledge; and afterwards brings an action in which he claims damages on both accounts: how is the defendant to plead the payment otherwise than generally? If he pleaded it to one account, he might be defeated by the plaintiff's shewing, that, the payment being made generally, he had exercised his right of appropriation, and had placed it to the other account. At all events, in whichever way he pleaded it as a specific payment, there would be a variance. The first case upon this subject was that of *Jourdain* v. *Johnson*, 2 C. M. & R. 564. There, to a declaration for 31*l.*, on a bill of exchange, and 100*l.* for money paid, lent, interest, goods sold, and on an account stated, the defendant pleaded, as to the 31*l.* and as to 12*l.* 2*s.*, parcel of the 100*l.* for goods sold, and as to the 100*l.* on the account stated, payment into court of 51*l.* 9*s.* 7*d.*, and alleged that the plaintiff had not sustained damage to a greater amount in respect of so much of those causes of action as in the plea mentioned. And the question was whether that plea was good on special demurrer, or whether it ought not to have shewn distinctly what portion of the money paid into court was to be ascribed to the bill of exchange. Lord Abinger, in delivering the judgment of the court, said: "If this had been a plea of payment into court of the sum of 51*l.* 9*s.* 7*d.*, or a less sum, to the whole declaration except to that part which relates to the bill, it would have been good; for, the sums claimed in the declaration are all of them liquidated damages, so as to admit of a payment of money into court, but the plaintiff is not bound to prove himself entitled to the precise sums alleged, in order to recover; and the defendant, by pleading the payment of money into court on such a declaration,

1837.

LORYMER v. VIZEY.

though he thereby admits that he did enter into contracts with the plaintiff for money paid, money lent, goods sold, interest, and account stated, does not admit that any *precise* sum was ever due to the plaintiff upon such contracts, still less the exact sums mentioned in the declaration; he only admits that some amount of liquidated damages had become due, but denies that the plaintiff was ever entitled to recover more by way of such damages than the sum paid into court. The plea would be therefore good, so far as relates to the whole of the declaration except the claim on the bill of exchange. Then, is it necessary to specify how much is paid in on one part, and how much on the other? It would be extremely inconvenient to defendants to be more restricted in that respect than they were under the old practice of paying money into court on the common rule, in place of which this plea is framed; and, as it was the constant practice to pay one sum into court generally on all the counts, we see no sufficient reason why this may not be equally done under the new rule. If, then, a plea of payment of 51*l.* 9*s.* 7*d.* into court on all the demands except that on the bill of exchange would be good, there is not the least ground for saying that it would not be good as to part of those demands." The next case is that of *Mee* v. *Tomlinson*, where, the declaration demanding several sums of money on distinct and separate counts, a plea of payment generally, not saying how much as to one and how much as to the others, was held to be ill, for that the defendant should have specified how much he paid in respect of each debt. *Jourdain* v. *Johnson* was not cited in *Mee* v. *Tomlinson*. [*Tindal*, C. J.—In *Jourdain* v. *Johnson*, the plea distinguished the several counts of the declaration to which it was intended to be pleaded, as it is contended the defendant should have done here.] The judgment of the court is general. In *Mee* v. *Tomlinson*, Patteson, J., says: "The objection principally relied on is, that the plea

1837.

LORYMER v. VIZEU.

does not state how much is due on the first count, and how much on the second. I think that this is a good objection. Since the new rules of pleading, we must consider that a count for work and labour is founded on a different cause of action from a count for money paid, and the plaintiff has a right to know how much is admitted to be due in respect of one cause of action, and how much in respect of the other. [How can the plaintiff have a right to know that which the defendant cannot tell him?] The only difficulty is, that the course of pleading a plea of tender to the whole declaration has been different. It is sufficient, however, to say that the course of pleading has been such that the practice in that particular case has become inveterate. It does not follow that we are to extend that form of pleading to a new case; especially since the new rules, the object of which was to cure the objections to the old system arising from the generality of pleading." But, on that case being cited in *Marshall* v. *Whiteside*, 1 M. & Welsby, 188, where it was held, that, where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into court of one entire sum in satisfaction of all the counts or breaches, Parke, B., said—"When the court of King's Bench decided that case, the judgment of this court in *Jourdain* v. *Johnson* was not known. I have had some conversation with Mr. Justice Patteson on this subject, and he said he was dissatisfied with that decision. He is now of opinion, that, where the plea amounts to an accord and satisfaction, it may be right to plead it separately to each particular count; but, where there is a plea of payment of money into court, it need not be pleaded to each count, but may be pleaded generally to the whole declaration. The practice formerly was, to allow money to be paid into court upon the whole declaration. I do not see what inconvenience the plaintiff has sustained; if too small an amount

1837.

LORYMER v. VIZEU.

has been paid in, he will be entitled to recover." [*Tindal*, C. J.—The plea here is not a plea of payment *into court:* it is not pleaded as an actual payment of so much, and nothing due beyond; it is a plea of accord and satisfaction pro tanto. I therefore do not see that *Marshall* v. *Whiteside* at all applies.] These are the only authorities that at all bear upon the point. The new rules have not introduced any new law on the subject. That which was a good plea before is equally good now.

Erle, in support of the demurrer.—The declaration is framed upon a charterparty by which the defendant engaged, amongst other things, to pay a given sum per month for the hire of the vessel, and to provide a homeward cargo. The first breach assigned is, that the defendant neglected to provide a homeward cargo; the second, the nonpayment of 200*l.* alleged to be due for four months' freight; the third, the nonpayment of 200*l.* claimed by the indebitatus count for freight, and other 200*l.* claimed to be due on an account stated: for all of which causes of action the plaintiff states that he has sustained damage to the extent of 300*l.* The defendant pleads generally, as to 476*l.* 14*s.* 7*d.*, parcel of the sums of money in the declaration mentioned, payment of that sum to the plaintiff before action brought, in full satisfaction and discharge of all the damages sustained by him as to that sum, and that the plaintiff accepted and received it in full satisfaction and discharge of such damages. The plea is not confined to any particular count: it is ambiguous; there is nothing to lead the plaintiff to a knowledge of what it is intended as an answer to. The plea should have been so drawn as to shew that it was not intended to apply to the first breach. *Jourdain* v. *Johnson*, and *Marshall* v. *Whiteside* were both pleas of payment into court after action brought, which is a very different thing from a plea of payment in bar of the action. No difficulty arises on a general plea of part payment into

court: but, where the plea is of a part payment in satisfaction before action brought, it ought to be made clearly to appear to what particular counts or breaches the plea is intended to apply itself.

1837.
LORYMER v. VIZEU.

TINDAL, C. J.—This is not a plea of payment into court, as in *Jourdain* v. *Johnson* and *Marshall* v. *Whiteside*, but of accord and satisfaction. The plaintiff ought not to be left in doubt as to whether or not the first breach was intended to be met by this plea: he had a right to see that the plea was clearly limited.

VAUGHAN, J., (the only other judge in court), concurring—

Judgment for the plaintiff.

BRETTILLOT *v.* SANDOS.

Thursday, Jan. 19*th.*

The Court refused to discharge a foreigner out of custody, on the ground that the debt for which he had been arrested was the balance of a demand upon which the plaintiff had received a dividend under proceedings in the country where the debt was contracted similar to our proceedings in bankruptcy: though it was sworn by a competent person that the law of the foreign country did not warrant an arrest of the person under such circumstances.

THE defendant was formerly a trader in France, where he became bankrupt, Proceedings similar to our proceedings in bankruptcy took place, and his estate was seized in the usual course, and a dividend made, of which the plaintiff (who was a creditor of the estate to the amount of 600*l.*) received his share. Both parties subsequently coming to this country, the plaintiff arrested the defendant for the residue of his debt.

Humfrey now moved that the defendant might be discharged out of the custody of the Warden of the Fleet, upon an affidavit detailing these facts; and also an affidavit made by a French advocate, in which it was stated that the person of the bankrupt was by the law of France sacred from arrest, where he had duly conformed. He

1837.

BENTILLOT v. SANDOS.

referred to *Phillips* v. *Allan*, 2 M. & R. 576, *De La Vega* v. *Vianna*, 1 B. & Ad. 284, and the cases there cited, for the purpose of shewing, that, where a debt is contracted between foreigners in a foreign country, and the remedy for its recovery, as against the person of the debtor, is barred by the law of the country where the debt was contracted, the courts of this country will not lend the aid of their process to enforce payment here by coercing the debtor's person; and to the case of *Naylor* v. *Eagar*, 2 Y. & J. 90, where it seems to have been considered, that, where under process from the supreme court of New South Wales (established by the 4 Geo. 4, c. 96,) the goods of a defendant are attached and rendered to the plaintiff in execution, or bail are put in to pay the condemnation money, the defendant cannot be arrested for the same cause of action in this country; and *Huber* v. *Steiner*, ante, Vol. 2, 304.

TINDAL, C. J.—The difficulty we feel is, that, in entertaining this motion, we should be trying a very grave question upon affidavit, and so depriving the plaintiff of his right to appeal to the opinion of a jury. That which is urged may, if true, be a very good ground of defence. But we cannot interfere in the summary way suggested.

VAUGHAN, J., concurring—

Humfrey took nothing by his motion.

Thursday, Jan. 19th.

In an action by five plaintiffs, the Court refused to allow satisfaction to be entered on the judgment-roll, on a warrant of attorney signed by four of them only, although it was sworn that the other plaintiff had gone to settle in America, and that the damages were merely nominal.

DAVIS and Others *v.* JONES.

HUMFREY moved for leave to enter satisfaction on the judgment-roll. There were five plaintiffs: four of them had signed the warrant of attorney; but the fifth, it

1837.

DAVIS v. JONES.

was sworn, had gone to America to settle, and therefore his signature could not be obtained. The officer had refused to enter satisfaction without an order of the court. The damages, it appeared, were merely nominal, and the judgment obtained so far back as the year 1832; and it was suggested that the attorney on the record consented.

TINDAL, C. J.—The absent plaintiff may have received no satisfaction. The defendant must endeavour to ascertain whether or not he has any agent in this country who could consent for him; the authority of the attorney ceases when judgment is obtained. A much more hopeless case must be made out to induce the court to break through a very salutary rule.

Humfrey took nothing by his motion.

DOE *d.* THOMAS BATH *v.* CLARKE and Others.

Thursday, Jan. 19th.

In ejectment, the lessor of the plaintiff claimed as heir of one T. B.; the defendant as devisee of the person last seised:—Held, that the grandson of an elder brother of T. B., who himself claimed to be entitled to the property in question, was a competent witness for the defendant; he having no immediate interest in the event of the suit, and the verdict and judgment not being available as evidence for him in any suit that might be instituted by him against the defendant for the recovery of the same property.

THIS was an action of ejectment to recover the value of tithes of land situate at Norbury, in Surrey. The cause was tried before Lord Abinger, C. B., at the last Summer Assizes at Guildford. The case on the part of the lessor of the plaintiff was as follows:—Thomas Bath, the common ancestor, died in 1746, leaving four sons—John, Thomas, Henry, and Andrew. John and Thomas died unmarried. John, the son of Andrew, was the first of the family who acquired an interest in the tithes in question. The line of Andrew failing, the property came to the line of Henry. Thomas, the lessor of the plaintiff, was the grandson of Henry, and heir of that line.

On the part of the defendants, it was attempted to be shewn that John, the son of old Thomas Bath, married

1837.

DOE d. BATH v. CLARKE.

and left an heir: and to support this case they called one John Bath, who stated that he was the grandson of John, and great-grandson of old Thomas; and that he, the witness, himself claimed to be entitled to the property in question. For the lessor of the plaintiff, it was objected that this individual was not a competent witness, he having a direct and immediate interest in defeating the claim of the lessor of the plaintiff, and coming to protect his own title and the interest of his own tenant.

It appearing, however, that the defendants claimed adversely to the witness—as devisees of one William Clark, who married Mary the daughter of John Bath, the owner of the tithes, and who had been in receipt of the tithes down to the time of his death—the Lord Chief Baron received the evidence (*a*). A verdict having been found for the defendants—

Platt, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the testimony of John Bath, the grandson, had been improperly received.

Thesiger and *Channell* now shewed cause.—The witness was properly admitted. The verdict never could be evidence for him. The defendants were not tenants of the property; but claimed to be entitled as devisees: the wit-

(*a*) It was suggested at the trial, that, if incompetent, the witness might still be examined, his name being indorsed on the postea pursuant to the 3 & 4 Will. 4, c. 42, ss. 26, 27. But that point was disposed of by a reference to the case of *The Bailiffs of Godmanchester* v. *Phillips*, 6 N. & M. 211, where it was held that the incompetency of a witness interested in the event of the suit cannot be removed by the indorsement of his name on the record under the statute. The language of the statute is—"that, if any witness shall be objected to as incompetent *on the ground that the verdict or judgment in the action in which it shall be proposed to examine him would be admissible in evidence for or against him*, such witness shall nevertheless be examined," &c. And see Burgess v. Cuthill, 1 Mood. & Rob. 315, accord.

ness and the defendants, therefore, were rival claimants. That removes the whole objection. The witness had no direct interest in the event of the suit one way or the other; for, on another ejectment brought by him against these defendants, it would be competent to them to set up any title to defeat his claim. In order to render a witness incompetent, he must have a direct and immediate interest in the event of the suit: the verdict must operate to procure for him an advantage or remove from him a liability which otherwise could not arise. This is not like the case of *Doe* d. *Teynham* v. *Tyler*, 4 M. & P. 29, 6 Bing. 390, where it was held that a remainder-man after a tenant in tail is not a competent witness for the tenant in tail, in an action of ejectment touching the entailed property; he having a direct interest in supporting the title of the tenant in tail. In *Doe* d. *Nightingale* v. *Maisey*, 1 B. & Ad. 439, it was held that the mother of a defendant in ejectment, who claims to retain possession of premises as heir at law to his father, is a competent witness for the defendant, although the effect of her testimony be to prove a seisin in law in her husband, which would give her a claim to dower. The rule is well laid down in *Bent* v. *Baker*, 3 T. R. 27—"No objection can be made to the competency of a witness upon the ground of interest, unless he be directly interested in the event of the suit, or can avail himself of the verdict in the cause, so as to give it in evidence on any future occasion, in support of his own interest." And that rule was assented to by Lord Kenyon in the subsequent case of *Smith* v. *Prager*, 7 T. R. 62. The rule is similarly laid down by Gilbert, C. B. (Gilb. Evid. 28), and in Phillipps on Evidence, Vol. 1, p. 55. Here the verdict could not in any event be evidence either for or against the witness: his testimony leaves him precisely as he was. The rule of law must be the same whether the subject-matter in dispute be realty or personalty; and in actions brought to recover a chattel, a witness may

1837.

Doe d. Bath v. Clarke.

prove property in himself. In *Nix* v. *Cutting*, 4 Taunt. 18, in an action of trover for a horse, it was held that a witness was competent to prove that the plaintiff agreed that he (the witness) should take the horse as a security for money due to him from the plaintiff, and should sell it if the money was not paid on a day certain; which being the case, the witness accordingly sold the horse to the defendant; for, the verdict obtained on his evidence would not avail him in an action to be brought against him by the plaintiff. And in *Ward* v. *Wilkinson*, 4 B. & Ald. 410, in trover by A. against B., C. was held to be a competent witness to prove property in himself.

Platt, in support of his rule.—The witness was clearly incompetent. He was interested in preventing the intrusion into the possession of Thomas Bath, with whom he might have more difficulty in contesting his title than with the defendants; and so he would obtain a benefit; for, the verdict and the evidence upon which it proceeded might be given in evidence for him in a subsequent action against the present defendants at the suit of the witness. It is not inconsistent with the defendants' case that they claimed under the witness: and the fact of their calling him almost amounts to an attornment to his title. The defendants would be estopped from disputing on a future occasion, as between them and the witness, the state of facts of which they on this occasion availed themselves.

Tindal, C. J.—Ita ppears to me that the witness was properly admitted. The lessor of the plaintiff attempted to make out his title to the tithes in question as the heir at law of Henry, one of the sons of Thomas Bath. The defendants, who by the consent rule, are admitted to defend as landlords, in order to defeat the title set up by the lessor of the plaintiff, offered to prove the existence of an heir of an elder brother of Henry Bath, which would have

1837.

DOE d. BATH v. CLARKE.

the effect of preventing the lessor of the plaintiff from recovering in this action, whether the present defendants had any title to the property or not. For this purpose, the defendants called one John Bath, the grandson of John, an elder son of Thomas Bath: and the question is whether this John Bath was or was not a competent witness. Now, it is well established that the only cases in which a witness is incompetent by reason of interest, are, where he has a direct and immediate interest in the event of the suit, or where the verdict may be used as evidence in his favor in a future action. First—Had the witness in this case an interest in the event of the suit? I agree, that, if the defendants had been shewn to have been holding under the witness, inasmuch as the consequence of a verdict for the lessor of the plaintiff would be the issuing of a writ of possession under which the defendants would be turned out, his interest would be as direct and immediate as that of the defendants themselves. But, in order to render the objection available, it was incumbent on the party making it to shew that such a relation existed between the defendants and the witness. That not having been done, I am of opinion that the objection, as to this part of it fails.—Then, could the verdict in this action be used as evidence for the witness in a future action to be brought by him for the recovery of the same property? The effect of the witness's testimony was, to procure a verdict and judgment in favor of *the defendants*. I therefore do not perceive how he could offer in support of his own claim a verdict and judgment which as far as they went directly established the defendants' right. But, it is said, he might shew the evidence upon which that verdict was obtained. It is true, the evidence might be used *against* him: but I never yet heard that it might be used *in his favor* as against a third person. It seems to me that the present case falls within the principle of *Nix* v. *Cutting* and *Ward* v. *Wilkinson*, where it was held, that,

1837.

DOE d. BATH v. CLARKE.

in trover for a chattel, a third person might be called to prove property in himself: and I think there is in this respect no distinction as to the character of the property that is sought to be recovered.

PARK, J.—I am of the same opinion. I well remember the argument of *Bent* v. *Baker*. Buller, J., there took great pains to lay down a certain and intelligible rule upon this subject—"That no objection can be made to the competency of a witness upon the ground of interest, unless he be *directly interested in the event of the suit*, or can avail himself of the verdict in the cause, so as to give it in evidence on any future occasion, in support of his own interest." Lord Kenyon afterwards, in *Smith* v. *Prager*, approved of that rule, and said he had always guided himself by it. The doctrine received a further confirmation by the case of *Doe* d. *Nightingale* v. *Maisey*. I think the counsel for the lessor of the plaintiff failed to make out that the witness was in such a situation as to render his testimony inadmissible.

VAUGHAN, J.—I am of the same opinion. The case is clearly governed by the rule laid down in *Bent* v. *Baker*, and recognized in the subsequent cases to which reference has been made, and to which may be added *Doddington* v. *Hudson*, 8 Moore, 253, 1 Bing. 257, where, in an action on the case by a reversioner for an injury done to his inheritance, the tenant in possession was held to be a competent witness to prove the injury. To render him incompetent, it must be shewn that the witness has an interest in the event of the suit, or that the verdict and judgment may be used as evidence in his favour in a subsequent action. Here, the witness was clearly disinterested, and the verdict could never avail him in any future action he might bring for the recovery of the same property. *Nix* v. *Cutting* and *Ward* v. *Wilkinson*, are in point.

Rule discharged.

1837.

JOHN DUMSDAY, Demandant; Sir RICHARD HUGHES, Bart., Tenant.

Friday, Jan. 20th.

THIS was a writ of right. The count, after describing the tenements sought to be recovered, stated, that Shadrach Blundell was seised of the tenements above demanded, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the Lord George the Second, late King of Great Britain, by taking the esplees thereof to the value &c.; and, being so seised thereof as aforesaid, the said Shadrach Blundell afterwards, to wit, on the 8th June, 1750, by a certain marriage settlement (which was set forth in the count), conveyed the premises to William Farnworth and John Salmon and their heirs, to have and to hold the same, with the appurtenances, unto the said William Farnworth and John Salmon, their heirs and assigns for ever, to the several uses and upon the trusts thereinafter limited and expressed and declared of and concerning the same, that is to say, to the use of the said Shadrach Blundell and his heirs until the solemnization of the said then intended marriage; and, from and immediately after the solemnization of the said then intended marriage (subject to a certain term of ninety-nine years thence next ensuing and fully to be complete and ended, if the said Shadrach Blundell and Ann Slater, his then intended wife, should both of them so long live), to the use of the said Shadrach Blundell for and during the term of his life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, in his lifetime, to the use of the said William Farnworth and his heirs for and during the natural life of the said Shadrach Blundell, upon trust and to the intent to support and preserve the contingent uses and estates thereinafter limited from being destroyed and defeated; and, from and after the decease of the said Shadrach

In counting on a writ of right, there must appear either by express averment or by necessary implication, a seisin in fee in the demandant or in the ancestor from whom he claims, within sixty years.

Seisin of Shadrach Blundell, the settlor.

Settlement.

1837.

DUMSDAY Dem., HUGHES Ten.

Blundell, to the use of the said Ann, his then intended wife, for and during her natural life, for her jointure and in satisfaction of her dower; and, from and after the decease of the survivor of them the said Shadrach Blundell and Ann his then intended wife, then to the use of the first and other sons successively of the body of the said Shadrach Blundell on the body of the said Ann to be begotten, in tail male; and, for default of such issue, to the use of all and every the daughter and daughters of the said Shadrach Blundell on the body of the said Ann, his then intended wife, to be begotten, in tail general, with cross-remainders if one or more of such daughters should die without issue; and, if all such daughters but one should die without issue, or if there should be but one such daughter, then to the use of such only daughter, in tail general; and, for want of such issue, to the use of the said Shadrach Blundell, his heirs and assigns, for ever: that, afterwards, to wit, on the 10th June, 1750, the said marriage was duly had and solemnized between the said Shadrach Blundell and Ann Slater; and that afterwards, to wit, on the 1st January, 1753, the said Shadrach Blundell died, leaving the said Ann him surviving, without leaving issue, and without ever having had issue by the said Ann; and thereupon the said Ann, the then widow of the said Shadrach Blundell, by force of the said last-mentioned indenture, and of the statute made for transferring uses into possession, then became seised of the said several tenements, with the appurtenances, in her demesne as of freehold and right for the term of her natural life, in the time of peace, in the time of our said lord George the Second, King of Great Britain, by taking the esplees thereof to the value &c., and continued and was so seised of the said several tenements, with the appurtenances, in the time of peace, in the time of the lord George the Third, late King of Great Britain, to wit, within sixty years now last past, by taking the esplees thereof to the

Death of settlor.

His widow seised for life.

1837.

DUMSDAY Dem., HUGHES Ten.

value &c.; and afterwards, to wit, on the 18th October, 1777, died so seised of the said several tenements with the appurtenances as aforesaid, to wit, at &c.; whereupon the right to the said several tenements with the appurtenances descended and came to one Mary Bushley (formerly Mary Blundell), one Elizabeth Blundell, one Jane Dumsday (formerly Jane Blundell), and one Hannah Gregory (formerly Hannah Blundell), as cousins and heirs of the said Shadrach Blundell, that is to say, as daughters and coheirs of one Edward Blundell, who was brother and heir of one John Blundell, who was son and heir of one other John Blundell, and which said last-mentioned John Blundell was father of one Nicholas Blundell, who was father of one Shadrach Blundell, who was father of the said first-mentioned Shadrach Blundell: that afterwards, to wit, on the 1st January, 1778, at &c., the said Elizabeth Blundell died without issue and intestate, whereupon all her right and interest in the said several tenements, with the appurtenances, descended and came to the said Mary Bushley, Jane Dumsday, and Hannah Gregory, as the surviving sisters and co-heirs of the said Elizabeth Blundell: that afterwards, to wit, on the 1st January, 1779, the said Jane Dumsday died, to wit, at &c., leaving one John Dumsday, her son and heir, her surviving, whereupon all her right and interest in the said several tenements, with the appurtenances, descended and came to the said last-mentioned John Dumsday as her son and heir; and that afterwards, to wit, on the 1st January, 1783, the said Mary Bushley died without issue and intestate, whereupon all her right and interest in the said several tenements with the appurtenances came and descended to the said Hannah Gregory and the said last-mentioned John Dumsday, as the surviving sister and nephew and co-heirs of the said Mary Bushley: and that afterwards, to wit, on the 1st January, 1786, the said Hannah Gregory died without issue and intestate, whereupon all her right and interest in the said

Death of tenant for life.

Right descended to M. B., E. B., Jane Dumsday, and H. G.

Death of E. B. without issue and intestate.

Death of Jane Dumsday, leaving John Dumsday her heir.

Death of M. B. without issue and intestate.

Death of H. G. without issue and intestate;

1837.

DUMSDAY Dem., HUGHES Ten.

2. Want of seisin in the settlor within sixty years.

Nor is it alleged that John Dumsday, the grandfather, was ever seised. The demandant counts through a marriage settlement, and through a person not his ancestor. Besides, it appears on the face of the count, that Shadrach Blundell, the ancestor, has been out of seisin for a period of eighty-one years. By the 32 Hen. 8, c. 2, s. 1, the statute first giving the shifting limitation to the time for suing out writs of right, it is enacted "that no manner of person or persons shall from henceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor which hath been or now is or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments, within three score years next before the teste of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought made, or had." The 2nd section of the statute provides "that no manner of person or persons shall hereafter sue, have, or maintain any assise of mort-ancestor, cosinage, ayel, writ of entry upon disseisin done to any of his ancestors or predecessors, for any manors, lands, tenements, or other hereditaments of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor which was or hereafter shall be seised of the same manors, lands, tenements, or other hereditaments, within fifty years next before the teste of the original of the same writ hereafter to be brought:" and, upon the construction of that clause, it was held, in *Widdowson* v. *Lord Harrington*, 1 Jac. & W. 532, that a demandant could not recover

1837.

DUMSDAY Dem., HUGHES Ten.

except upon an allegation of a seisin within fifty years. And the seisin must be a seisin, in fact and not in law. In *Dally* v. *King*, 1 H. Blac. 1, it was expressly decided that a writ of right cannot be maintained without shewing an actual seisin, by taking the esplees, within sixty years, either in the demandant himself or in the ancestor from whom he claims.

1. That it sufficiently appeared how the parties were nieces.

Stephen, Serjeant, for the demandant.—In the case cited from 3 Bos. & Pull., it did not sufficiently appear how the parties referred to were nieces and coheirs of Shadrach Blundell. That objection is not to be found in the present case. The count states that "the right descended and came to Mary Bushley, Elizabeth Blundell, Jane Dumsday, and Hannah Gregory, as cousins and heirs of Shadrach Blundell, that is to say, as daughters and co-heirs of one Edward Blundell, who was brother and heir of one John Blundell, who was son and heir of one other John Blundell, and which said last-mentioned John Blundell was father of one Nicholas Blundell, who was father of one Shadrach Blundell, who was father of the said first-mentioned Shadrach Blundell." The defect, therefore, that was fatal to the demandant's claim on the former occasion, is here completely remedied.

2. As to the necessity for *alleging* in the count a seisin within sixty years.

In no case is it necessary, in a writ of right, to allege in terms a seisin within sixty years last past; and, if necessary in any case, it is at all events not so under circumstances like the present. It may be conceded that it is not unusual, when counting as heir, for the demandant to allege a seisin within sixty years, or within thirty years when the party counts on his own seisin: but the precedents are both ways. "Et unde dic' quod ipsimet fuer' seisit' de maner' advoc' tenement' et reddit' prædict' cum pertinèn' in dominico suo ut de feodo et jure, et de advoc' prædict' cum pertineh' ut de feodo et jure, tempore pacis, tempore Domini Regis nunc, capiendo

1837.

DUMSDAY Dem., HUGHES Ten.

inde exples. ad valenc'," &c. Booth, 94—citing Rast. Ent. 246. a. b. Rastall's Entries were first compiled in 1564, twenty years after the statute of limitations upon which the tenant principally relies. " Et unde dic' q ipsimet fuit seisitus de teñtis ꝑd. cum ptiñ in dñico suo ut de feodo et juř tẽpe Dñi Reg. nũc capiẽd ind' explec. ad valenc̃." &c. Rast. Ent. (Edit. 1574), 233. a.—" Et unde dicit q ipsimet fuer̃ seisiti de teñtis predictis cum ptinentijs in dñico suo ut de feodo et jure tempore pac. tẽpore Dñi Philippi et Dñe Marie, nuper regis et regine Angl', capiend' inde exples' ad valenc̃." &c. Co. Ent. 182. a. —" Unde dic̃ qd' ipsimet fuerũt seisiti de teñt ꝑd cũ ptiñ in dñico suo ut de feodo et jure, tẽpe pac̃, tempore Dñi Regis nunc, capiendo inde explec̃ ad valẽc̃" &c. Rast. Ent. 237. a."—" Et unde dic. q ipsimet fuerunt seisit' de maneriis, &c., in dominico suo ut de feodo et jure, tempore pacis, tempore Domini Regis nunc, capiend' inde explec̃ ad valenciam" &c. Rast. Ent. 238. b. None of these precedents contain any precise averment of a seisin within sixty years. [*Tindal*, C. J.—These are old precedents, probably in use anterior to the statute.] Rastall is well known to have been a most careful compiler; and he is not very likely to have fallen into an error of that sort. The count undoubtedly would be bad if it appeared inferentially on the face of it that the seisin relied on was of an older date than sixty years.

One general rule applicable to statutes, is, that, unless expressly passed for that object, they operate no change in the course of pleading: and it would be contrary to all analogy if the statute 32 Hen. 8, c. 2, should be held to alter the form of counting in a writ of right. One of the earliest forms of counting in such a case is that found in Bracton, fol. 372. b., 373:—" Hoc ostendit vobis A. quod B. injustè ei deforciat tantum terræ, cum pertinentiis, in tali villâ, et ideo injustè, quia quidam antecessor suus nomine C. fuit inde vestitus et seysitus in dominico suo ut

1837.

DUMSDAY Dem., HUGHES Ten.

de feodo et in jure, tempore H. regis, avi Domini Regis, vel tempore Regis Ricardi, avunculi Domini Regis, vel tempore Johannis Regis, patris domini Regis, tempore H. Regis qui nunc est, capiendo inde expletia ad valentiã quinque solidorũ, vel dimidiis marcæ, sicut in bladis, pratis, redditibus, et aliis exitibus terræ; et de prædicto C. descendit jus terræ illius vel descendere debuit (secundum quosdam) cuidam D., ut filio et hæredi; et de prædicto D., cuidam E., ut filio et hæredi; et de prædicto E., isti A. qui nunc petit, ut filio et hæredi: et quod tale sit jus suum offert disrationare per corpus talis liberi hominis sui, vel alio modo sicut curia consideraverit." "Et ideo, si non fiat mentio de expletiis, cadit actio petentis. Item adjicitur in narratione, tempore talis Regis; certum enim oportet exprimere tempus, et certum Regem de cujus tempore loquatur." The count in the present case in every respect agrees with the form given by Bracton: it shews the demandant's pedigree, and alleges that the ancestor was seised in fee by taking the esplees in the time of George the Second. The statute 32 Hen. 8, c. 2, merely requires that there shall be a seisin within sixty years; it does not say that the demandant shall not count without *alleging* a seisin within that period. The 6th section puts it rather upon proof than allegation; it enacts, "that, if any person or persons at any time hereafter do sue any of the said actions or writs for any manors, lands, tenements, or other hereditaments, or make any avowry, cognisance, prescription, title, or claim of or for any rent, suit, service, or other hereditaments, and cannot *prove* that he or they, or his or their ancestors or predecessors, were in actual possession or seisin of and in the same manors, lands, tenements, rents, suits, services, annuities, commons, pensions, portions, corrodies, or other hereditaments, at any time or times within the years before limited and appointed in this present act, and in manner and form as is aforesaid, if the same be traversed or denied

1837.

DUMSDAY Dem., HUGHES Ten.

by the party plaintiff, demandant, or avowant, or by the party tenant or defendant, that then and after such trial therein had, all and every such person and persons, and their heirs, shall from henceforth be utterly barred for ever of all and every the said writs, actions, avowries, cognizance, prescription, title, or claim hereafter to be sued, had, or made, of and for the same manors, lands, tenements, hereditaments, or other premises, or any part of the same, for which the same actions, writ, avowry, cognizance, prescription, title, or claim hereafter shall be at any time had, sued, or made." The seisin is not the subject of a traverse—Year Book, 10 Edw. 3, fol. 20, pl. 22: "Et nota en breve de droit home ne prendra issue nient seisi puis la limitation, &c., mes inquer. per assize de la seisin, &c., ou de tiel roy, et demi-mark pur le temps." The object of the tender of the demi-mark, where the mise is joined on the mere right, is, that the seisin in the king's reign as alleged may be inquired into: it in effect amounts to a traverse or denial of the seisin with sixty years, and is the only course by which it can be done.

But, if an allegation of seisin within sixty years be necessary in ordinary cases, it is not necessary under circumstances like the present. The count alleges a seisin in the reign of George the Second; it then out a marriage settlement under which Shadrach Blundell (the settlor) took an estate for life, remainder to Ann Blundell for life, &c., and an ultimate remainder in fee to the heirs at law of the settlor; and avers the death of Shadrach Blundell in 1753, and of Ann Blundell, the tenant for life (seised of the premises) in 1777. If this is a case in which a writ of right lies, it cannot be necessary for the demandant to allege a seisin within sixty years. An estate for life has intervened over which he had no control. There is no privity between him and Ann Blundell.

That a writ of right may be maintained under such cir-

1837.

DUMSDAY Dem., HUGHES Ten.

cumstances, is clear. Lord Coke says, Co. Litt. 281. a.: "Lands are letten to A. for life, remainder to B. for life, remainder to the right heir of A.: A. dieth; B. entereth and dieth; a stranger intrudeth; the heir of A. shall have a writ of right of the seisin which A. had as tenant for life." That is a distinct and decisive authority: it has always been cited as admitted law. [*Tindal*, C. J.—There, A. had the fee.] So, here, the settlor had the fee. [*Tindal*, C. J.—No.] Shadrach Blundell had the ultimate remainder in fee expectant on the determination of the intermediate estates. The object of the statute was, that a party should have sixty years within which to adduce his claim: it would be a grievous hardship to hold the demandant to be deprived of his writ droitural by the accident of the length of an intervening life. It would be unreasonable and unjust in the extreme to hold the demandant to be barred because he cannot allege a seisin in Shadrach Blundell within sixty years last past. During the life of Ann Blundell, the demandant had no right of entry: her estate, therefore, is to be taken out of the account in calculating the limitation applicable to the demandant's claim. In the 2nd Institute, Lord Coke, commenting upon this statute, says, 2 Inst. 95: "Albeit homage, fealty, and escuage, and other accidental services, are within the letter of the law, yet they and all other accidental services, as, heriot service, or to cover the lord's hall, and the like, for that they may not happen within the times limited by that act, are by construction out of the meaning of this statute of 32 Hen. 8: and in *Bevil's* case, 4 Rep. 11. a., it was resolved that the said act does not extend to such rent or service which by the common possibility may not happen or become due within sixty years; as, if a seisin consists of homage and fealty only, for, the tenant may live above sixty years after they are due: so, if the service be to cover the lord's hall, or to go with him when there shall be war between the king and any of

3. That the case was not within the equity of the statute 32 Hen. 8, c. 2.

1837.

DUMSDAY Dem., HUGHES Ten.

his enemies, such casual services, which by common possibility may not happen within sixty years, are not within this act. The same law of formedon in descender; for, the tenant in tail may live sixty years after discontinuance, and although in facto he dies within the time, so that the issue may bring his formedon, and although the issue does not prosecute any writ within the time, yet the issue may bring it at any time, &c. Also in writs of escheat and cessavit, they demand the land and cannot allege any seisin in the same land, &c., as the statute speaks. And therefore these writs are not within the statute; for, the act extends only to such writs where the demandant or his ancestors may have seisin of the land in demand within the time of the limitation prescribed by the act. And the statute doth not compel them to any impossibility." So, in Co. Litt. 115. a., it is said: "But it is to be observed that this act of 32 Hen. 8, extendeth not to a formedon in the descender, nor to the services of escuage, homage, or fealty; for, a man may live above the time limited by the act. Neither doth it extend to any other service which by common possibility may not happen or become due within sixty years—as, to cover the hall of the lord, or to attend on his lord when he goeth to war, or the like. Nor where the seisin is not traversable or issuable. Neither doth it extend to a rent created by deed; nor to a rent reserved upon any particular estate, &c.; nor to any writ of right of advowson, quare impedit, or assize of darrein presentment; for, there was a parson of one of my churches that had been incumbent there above fifty years, and died but lately." The view of the subject taken by Sir Thomas Plummer in *Widdowson* v. *Lord Harrington*, which was a writ of intrusion, is not consonant with that taken by Lord Coke, who holds, that, notwithstanding the general terms of the statute, those cases are excepted in which injustice would be done by requiring an allegation of a seisin within sixty years. In Moore,

1837.

DUMSDAY Dem., HUGHES Ten.

31, it is said: "En un replevin le def. avow pur un rent charge grant à luy; et exception fuit prise al avowry p ceo que il ne alledge seisin des ceo deins les [lx] ans, solonq; le stat' de 32 Hen. 8, c. 2: mes l'avowry fuit tenus assets bone, car coment que le statute limit de quel temps le seisin srã alledge deins le temps de limitation, unč ceo est destre entend lou ceo duissoit aver eẽ alledge avant al cõmon ley." So, in Brook on the Statute of Limitations, 13: "And note, that, in all writs of right, aiel, cosenage, writ of obiit, and in all other writs in which men shall allege esplees, or make mention of any seisin when they declare, there they shall make a special allegation of the esplees within such a time within the limitation of the statute, that is to say, tempore regis nunc, and the like. But, where he allegeth seisin anno octavo, and in truth the seisin was anno 9, this is not traversable; but, where the seisin was before, which is out of the limitation, that is material and issuable. And note, that, if the seisin may be proved within the years before the limitation, that sufficeth, because the statute saith, that, if the seisin shall be traversed, and the demandant cannot prove the seisin within the years before limited, that he upon such trial shall be barred, and his heirs," &c. By the equity of the statute, the demandant in the present case is excluded from its letter. Mr. Roscoe (Real Actions, p. 11,) observes on the case of *Widdowson* v. *Lord Harrington*: "In a very late case it was held, that, in a writ of intrusion, the fifty years allowed by this statute must be accounted from the seisin of the person who created the particular estate for life, and not from the death of the tenant for life, or the commencement of the adverse possession. But see what is said by Gibbs, C. J., in *Romily* v. *Jones*, 1 Marsh. 592, 599, 6 Taunt. 263: and quere, for, it might be impossible for the demandant or his ancestor to get seisin of the land if the tenant lived more than fifty years. And see *Bevil's* case, 4 Rep. 11. a., where it is said, on the fourth

1837.

DUMSDAY Dem., HUGHES Ten.

section of the same act, that, if the lord release the services to the tenant as long as I. S. has heirs of his body, and sixty years pass, and I. S. afterwards dies without heirs of his body, the lord may yet distrain, for it was impossible that he should attain to any seisin within that time. Et impotentia excusat legem."

Then it is said that the demandant should have shewn that Jane Dumsday was married, and that John Dumsday, her son, the grandfather of the demandant, was dead. It is not usual in such cases to allege the marriage or death of parties: no such allegation is to be found in any precedent. "Ut filio et hæredi" is enough; for, the party could not be son unless his parents were married; nor heir unless his ancestor were dead—nemo est hæris viventis. All the precedents are in this respect in accordance with the form of count here adopted—"Et unde idem Johannes Delves et Isabella dic' quod quidam W. fuit seisit' in dominico suo ut feodo et jure, tempore pacis, tempore H. quondam Regis, capiend' inde exples'. Et de ipso W. quia obiit sine hered' descend' jus cuid' Philippo ut fratri et hæred'. Et de ipso Philippo descend' jus cuid' David de Malpas, &c. Et de ipso David descend' jus cuid' Phil. ut fil' et hæred.' Et de ipso Phil. descend' jus &c. ist' Isabellæ qu' nunc petit simul &c., et cuidam Ellene sorori ejusdem Isabellæ, ut filiabus et hæred. &c. Et de ipsa Ellena descend' jus propartis su' ipsar' inde contigentis &c. præfat' W. fil' W., ut fil' et hæred." &c. Booth, 104. [*Tindal*, C. J.—I don't like that precedent: there are too many blanks in it.] The precedent in Bracton is at least free from *that* objection.

Reply.—2nd point.

Bayley, in reply, was desired by the court to confine himself to the first objection—as to the necessity of alleging a seisin within sixty years.—The precedents cited from Rastall and Coke are not incompatible with the argument urged on the part of the tenant. It does not

1837.

DUMSDAY Dem., HUGHES Ten.

appear whether those precedents were framed before the passing of the 32 Hen. 8, c. 2, or since: if before, it was not necessary to allege a seisin within sixty years: and if since, they do in effect contain such an allegation; for, they all refer to a seisin in the reign of a king of whose reign within sixty years last past the court would take judicial notice. Here, the count alleges a seisin in the time of George the Second, whose reign terminated in 1760; and therefore the court will take judicial notice that the seisin upon which the demandant counts was nearly eighty years since: and it also appears on the face of the count that the ancestor under whom the demandant claims has been dead considerably more than sixty years. The statute, the words of which are express, makes it incumbent on the demandant in such a case to shew a seisin either in himself or in the ancestor under whom he claims within sixty years.

Second point.

TINDAL, C. J.—I am of opinion that the count in this case is bad, inasmuch as it does not appear upon the face of the record that the ancestor from whom the demandant claims was seised of the land in question within sixty years next before the teste of the writ of right. I do not say that an express allegation in the count to that effect is absolutely necessary. Many of the precedents are found without it. But I think it is impossible to read the statute 32 Hen. 8, c. 2, s. 1, without seeing that the legislature has required the demandant to shew affirmatively upon the record, either by express averment or by necessary inference from the dates, that the seisin upon which he counts was within sixty years from the teste of the writ. The words of the section are—"That no manner of person or persons shall from henceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim of, to, or for any manors, &c., or other hereditaments, of the possession of his or their ancestor or pre-

1837.

DUMSDAY Dem., HUGHES Ten.

decessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor which hath been or now is or shall be seised of the said manors, &c., within three score years next before the teste of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought, made, or had." It appears from this enactment that there must be on the face of the writ itself some state of facts shewing that it has been properly sued out. Now, it is to be observed that there is a great difference between the language of the statute just referred to and that of the statute of limitations, 21 Jac. 1, c. 16, which provides that all writs &c. shall be sued and taken within certain periods therein prescribed—not stating any necessity for any allegation that the cause of action accrued to the plaintiff within the prescribed period, but leaving the non-accrual to be set up by the defendant as a bar to the action. The statute 32 Hen. 8 enacts that no manner of person shall sue, have, or maintain any writ of right of the possession of his ancestor, and declare and allege any further seisin or possession of his ancestor, but only of the seisin or possession of his ancestor which hath been or now is or shall be seised of the manors &c. within three score years next before the teste of the same writ &c. The tenant in a writ of right never pleads the statute; but the course is, to tender the demi-mark at the proper time, in order to put the demandant to proof of a seisin in fact within sixty years (*a*). The statute, undoubtedly, does not require an express allegation of a seisin within sixty years: but it states that the party can only maintain his writ by shewing on the face of it that it was sued out within the time limited. And that seems to me to afford an answer to the argument

(*a*) As to the effect of the tender of the demi-mark, and the time and manner of making it, see Spires, Dem., Morris, Ten., 3 M. & Scott, 118, and Davies, Dem., Lowndes, Ten., 2 Scott, 74.

1837.

DUMSDAY Dem., HUGHES Ten.

drawn from the precedents that have been cited on the part of the demandant. In some of them, it is true, there is no express allegation that the ancestor was seised within sixty years: but in every one of them, the time of the alleged seisin appeared to be within sixty years—"Tempore domini regis nunc," "Tempore domine Philippi et dominæ Mariæ nuper regis et regina Angliæ." The court, therefore, would take judicial notice that a seisin in the time of the then king, or of his immediate predecessor, would be a seisin within sixty years. So, here, if the seisin had been alleged in the time of William 4, or George 4, the objection could not have arisen; for we judicially know that the reign of the first of those kings commenced within sixty years last past. I take that to be the reason why precedents are found sometimes containing and sometimes omitting the allegation in question. If it be the duty of the demandant to shew that his writ was sued out within the sixty years, it must not be left in doubt: we cannot presume that his writ was sued out twenty years ago, and kept alive by continuances. On this ground, therefore, I think the demandant has not brought himself within the statute of Henry 8. But the case does not rest there; for, it appears that Shadrach Blundell, the settlor, died, and that the tenant for life entered, in the reign of George the Second: there is, therefore, not only an entire absence of any allegation of seisin in Shadrach Blundell within sixty years, but an express allegation that the tenant for life (after the death of Shadrach Blundell) entered more than sixty years ago.

A further ground of objection is, that a writ of right is not the proper remedy on such a state of facts as that disclosed by this record. This is not like the case cited from Co. Litt. 281, a. There A., according to the rule in *Shelley's* case, 1 Rep. 93 (*a*), would take an estate in fee.

A., seised of lands, settled the same, on his marriage in 1750, to the use of himself for life, and, from and after his decease, to the use of his widow, for her jointure

(*a*) That, if an estate of freehold be limited to A., with *remainder* to his heirs, general or special, the remainder, though im-

1837.

DUMSDAY Dem., HUGHES Ten.

Here, the estate interposed between the first taker's life estate and the remainder in fee, is not an estate for life, but an estate tail; and the demandant's proper remedy was, not by writ of right, but per formam doni. "A formedon is a writ so called à forma donationis, because the form and manner of the gift is set forth in the writ, and is a peculiar writ for an issue in tail, or for him in remainder or reversion, to recover the possession of lands and tenements, or hereditaments, when the estate tail is discontinued, and the remainder or reversion displaced and turned into a right." 1 Inst. 327; Fitz. N. B. 527, 528. "And this is the writ of right of the issue in tail, for he can have no higher writ." 1 Inst. 326. b., 2 Inst. 221. a. "There are three kinds of writs of formedon—1. in descender, to be brought by the issue in tail, who claimeth by descent secund' formam doni—2. in the reverter, for him in reversion after the estate tail spent—3. in the remainder, for him in the remainder, his heirs or assigns, after the determination of the estate tail, or other particular estate upon which the remainder depended. 1 Inst. 326. b. The first of these is given by the statute of W. 2, c. 1, de donis conditionalibus, and the form is there set down. 2 Inst. 336, Pl. Com. 240. But at common law in one special case there was formedon in descender—Pl. Com. 234. b. The second, in reverter, lay at common law after the determination of the estate tail, which was then an estate in fee-simple conditional—Pl. Com. 235. The last, in remainder, was before at common law in some cases, as upon an estate for life, but not upon an estate tail, because no remainder could be limited upon it at common law because it was a fee-simple; but after the statute a remainder may"—2 Inst. 336. The formedon in reverter, therefore, was the proper remedy in this case.

and in satisfaction of her dower, and, from and after the death of them, the settlor and his wife, to the use of the first and other sons &c. successively, and, for want of issue, to the settlor's own right heirs and assigns for ever. The settlor died in 1753, without ever having had issue; whereupon his widow became seised in fee for the term of her natural life. The widow died in 1777.

Semble, that, the estate interposed between the first taker's life estate, and the remainder in fee, being an estate tail, and not a mere estate for life, a *writ of right* did not lie for the recovery of the lands, at the suit of the grandson of the nephew and heir of the survivor of the four nieces and co-heirs of the settlor: but that the proper remedy was by a *formedon in reverter*, to be sued out within twenty years

porting an independent gift to the heirs as original takers, shall confer the inheritance on A., the ancestor. See the remarks upon this rule in Hayes's Introduction to Conveyancing, 3rd edit., 396, n.

1837.

DUMSDAY Dem., HUGHES Ten.

With regard to the alleged hardship of the demandant's being, under the circumstances of the case, deprived of his writ droitural, all that can be said, is, that he has mistaken his course: his writ droitural is the formedon in reverter; and the time for suing out that writ is, by the 21 Jac. 1, c. 16, limited to twenty years next after the accrual of the right. When the estate tail determined, the demandant had a right during that period to bring an ejectment or to sue out a formedon in reverter; both of which stand on the same footing with respect to the limitation of the time for bringing them. The demandant has attempted to arm himself with weapons which the law has denied him.

after the determination of the estate tail.

VAUGHAN, J.—In Roscoe on Real Actions, p. 176, it is said: "In counting upon a writ of right, the demandant must shew in himself a right in fee-simple to the lands demanded; which is done by averring in himself, or his ancestor from whom he claims, a seisin in his demesne as of fee and right; and, if he declares on the seisin of his ancestor, by shewing a descent of the right to himself as heir. The seisin to support a writ of right must, as it has been already stated, be an actual seisin, and must be averred in the count to have been by taking the esplees, which are evidence of actual seisin." The words of the statute are—"that no manner of person or persons shall from henceforth sue, have, or maintain any writ of right, but only of the seisin or possession of his ancestor or predecessor which hath been, or now is, or shall be seised of the said manors &c., within three score years next before the teste of the same writ." In all modern precedents, the seisin within sixty years is alleged.

PARK, J., who came into court whilst the argument was proceeding, gave no opinion; but observed that he saw no reason for dissenting from the judgment pronounced by the rest of the court.

Judgment for the tenant.

1837.

MORGAN and Another *v.* PEBRER.

Friday, Jan. 20th.

A wager on the future price of foreign funds is not void or illegal, either by the 7 Geo. 2, c. 8, or at common law.

To indebitatus assumpsit on a contract, the defendant pleaded specially another contract inconsistent with the contract declared on:—Held, bad, as amounting to non assumpsit.

THE first count of the declaration stated, that, on the 23rd February, 1835, in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount, to wit, 10,000*l.*, of a certain foreign security, commonly known by the name of Spanish Cortes Bonds, and also in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount, to wit, 30,000*l.* of a certain other foreign security, commonly called and known by the name of Spanish Scrip, the defendant undertook and then faithfully promised the plaintiffs to indemnify and secure the plaintiffs against all losses, damages, and expenses which they should or might incur, bear, pay, or sustain, by reason of the purchasing the said securities for the defendant, by giving or depositing with the plaintiffs the value and amount of ten per cent. on the market price of the said securities so to be purchased by the plaintiffs for the defendant as aforesaid, and also that, in the event of the prices or value of the said securities so to be purchased by the plaintiffs for the defendant falling or coming lower than the value or amount of ten per cent. on the market price, the defendant would replace the said amount of ten per cent., by giving or depositing with the plaintiffs a further sum or amount of ten per cent., upon due notice, or that the said securities so purchased by the plaintiffs for the defendant should be sold; that the plaintiffs, confiding in the promise and undertaking of the defendant, did afterwards, to wit, on the 13th March, 1835, purchase for the defendant a large amount, to wit, 10,000*l.*, of the securities called Spanish Cortes Bonds, and also a large amount, to wit, 30,000*l.*, of the other securities, called Spanish Scrip, of all which the defendant had notice; nevertheless the defendant, disre-

garding and neglecting his promise and undertaking, did not nor would give or deposit with the plaintiffs the value or amount of ten per cent. on the market price of the said securities so purchased by the plaintiffs for the defendant, but neglected and refused so to do: that the price or value of the said securities so purchased by the plaintiffs for the defendant did afterwards, to wit, on the 1st June, 1835, fall or come lower than the value or amount of ten per cent. on the market price of the said securities; and that the plaintiffs afterwards, to wit, on the 21st August, 1835, gave the defendant due notice of such depreciation or fall in the value or price of such securities, and requested the defendant to replace the said sum or amount of ten per cent. on the market price of such securities, according to his promise; yet the defendant, not regarding his promise and undertaking, but contriving and intending to defraud the plaintiffs in that behalf, did not nor would replace the said sum or amount of ten per cent. on the market price of the said securities, but neglected and refused so to do: that, by reason of the defendant's neglect and refusal to replace the said sum or amount of ten per cent. on the market price of such securities, the plaintiffs were obliged to sell, and did afterwards, to wit, on the 31st August, 1835, sell the said securities so purchased by them for the defendant as aforesaid for less prices than those at which they had purchased the same for the defendant, to wit, at the price of 40¾ per cent. for the security called Spanish Scrip, being the best they could obtain for the same: and that the balance or difference between the prices at which the said securities were purchased by the plaintiffs for the defendant, and those for which the securities were sold, amounted in the whole to a large sum of money, to wit, the sum of 2,600*l.*; whereof the defendant afterwards, to wit, on &c., had notice; nevertheless the defendant had not, although often requested so to do, as yet paid the plaintiffs the amount of the said

1837.

MORGAN v. PEDRER.

balance or difference, or any part thereof, but had hitherto wholly neglected and refused, and still neglected and refused so to do.

The declaration also contained counts for work done in buying and selling securities, for money lent, money paid, for interest, and for money found to be due on an account stated.

Eighth plea.

To the first count, the defendant pleaded—That the said contract in respect whereof the defendant undertook to indemnify and save harmless the plaintiffs, as in the first count was mentioned, was a certain contract by the plaintiffs, as brokers of the defendant, knowingly made and negotiated for the pretended purchase of certain public securities, to wit, 10,000*l.* public securities called Spanish Cortes Bonds, and 30,000*l.* public securities called Spanish Scrip, to be delivered on a future day, to wit, on &c., that is to say, a certain pretended contract for the purchase of certain public securities to be delivered on a certain future day, to wit, on &c., which was in truth and in fact a wager made on the day and year first in the plea aforesaid respecting the price and value of certain public securities given by the lawful government of Spain to the national creditors of Spain, which country and the lawful government thereof was then and still is in amity with this realm and his present Majesty the now king of this realm, and the price and value of which securities depended upon the prosperity of the said country of Spain, and the maintenance of peace by Spain with this realm and other nations; and by the said wager, under pretence of a contract, the plaintiffs, as brokers for the defendant, agreed with certain other persons to the defendant unknown, that, if the price and value of the said securities should be higher on the said future day than on the day when the said wagering contract was made as in the plea mentioned, to wit, higher than 60 per cent., he, the defendant, should receive the amount of difference between

the value of the said securities, to wit, 10,000*l.* Spanish Cortes Bonds, and 30,000*l.* Spanish Scrip, on the day when the said contract was made, to wit, 60 per cent. and the higher value, on the said future day; and, if the price and value thereof should fall, the defendant should in like manner pay the amount of difference between the value on the said day when the contract was made as aforesaid, to wit, 60 per cent., and the value on the said future day—verification.

To the last three counts, the defendant pleaded—That the said money was paid and lent, and the said interest accrued, and the said account was stated of and concerning and in respect and on account of a certain contract made between the plaintiffs and the defendant, by which the plaintiffs undertook, in consideration that the defendant, at the request of the plaintiffs, had employed them as his brokers at a certain reward and commission therefor to him to be paid, that they, the plaintiffs, would find money and purchase for the defendant a large amount of certain public securities, to wit, 10,000*l.* Spanish Cortes Bonds, and 30,000*l.* Spanish Scrip, upon the terms following: that is to say, that they, the plaintiffs, should receive a certain interest, to wit, 5 per cent., on all advances of cash and payments made by them on account of the said purchase, and that they should hold and retain in their hands, as security for advances and payments, the said securities so to be purchased as aforesaid; and that, as an additional security, the defendant should deposit ten per cent. upon the market prices of the said securities, and should, in case the said securities should fall or come lower in price, upon notice being given by the plaintiffs to the defendant, from time to time deposit with the plaintiffs such a further amount as should correspond with the existing market price or value of the said securities at the time when the contract was made as aforesaid, and ten per cent. thereupon; and that the plaintiffs should be repaid

Eleventh plea.

1837.

MORGAN v. PEBRER.

for all advances and payments in manner following, viz., that, if the plaintiffs should, within a reasonable time after the making of the said purchase, give notice to the defendant to repay to them the amount of the advances and payments made by them on account of the defendant, he, the defendant, should, within a reasonable time after such notice, receive the said securities from the plaintiffs, and the deposits thereon, and should repay to them all advances and payments made by them for and on account of the defendant in respect of the said purchase, with interest thereon; or that, if the said securities should fall or come lower in value than the said ten per cent. on the market price, and the defendant should, on due notice being given by the plaintiffs to the defendant of the said reduction in price, neglect or refuse to deposit such additional sum as should maintain and keep up the deposit to ten per cent. upon the existing market price, they, the plaintiffs, should be at liberty to sell the said securities then in their hands, and apply the proceeds of such sale to the repayment to them of any advances and payments made by them for and on account of the defendant in respect of the contract of purchase in this plea mentioned; and that the defendant should afterwards reimburse the plaintiffs for any losses occasioned by such resale, after notice as aforesaid: that, afterwards, to wit, on &c., the plaintiffs did, in pursuance of the said agreement, purchase on account of the defendant a large amount, to wit, 10,000*l.* Spanish Cortes Bonds, and 30,000*l.* Spanish Scrip, which the plaintiffs then retained in their hands: that the defendant, in pursuance of the said agreement, had done all things on his part and behalf to be performed; and that he did afterwards, to wit, on &c., deposit with the plaintiffs the amount of ten per cent. on the said securities, to wit, 2,800*l.* Spanish Debentures, and 500*l.* of lawful money of this realm, which the plaintiffs then accepted and received as a deposit of ten per cent. upon the mar-

ket price of the said securities: that the plaintiffs had not at any time since the making of the said contract or before the commencement of this suit given him the defendant notice to repay the amount of any advances or payments made by them in respect of the said contract, nor had the plaintiffs given the defendant any notice of any depreciation or fall in the value of the securities so purchased by them in pursuance of the said agreement: nevertheless, the plaintiffs did not regard their said agreement, but, in violation thereof, sold the said securities so purchased by them as aforesaid, and applied the proceeds in payment of such advances and payments as had been made by them in pursuance of the contract in this plea mentioned: that the money in the third count of the declaration mentioned, was lent by the plaintiffs to the defendant to purchase the securities aforesaid in this plea mentioned: that the said money was delivered by the defendant to the plaintiffs, and was by them applied in the purchase of the said securities in this plea before mentioned: and that the interest in the fifth count accrued in respect of the monies in the third and fourth counts mentioned, so lent and advanced by the plaintiffs to the defendant as aforesaid, and so paid to his use as aforesaid: that the account stated in the last count was stated of and concerning the monies in the third and fourth counts mentioned, and the interest thereon, and of no other claim, debt, or demand whatsoever—verification.

There were other pleas, tendering issues on the stock-jobbing act, 7 Geo. 2, c. 8, which were ultimately abandoned. General demurrer, and joinder.

The points marked for argument on the part of the plaintiffs were—as to the eighth plea—that it contained nothing to shew that the contract set forth in the declaration to which that plea was pleaded, was illegal or void at common law or by reason of any statute:—and, as to the thirteenth plea—that it was double, containing an averment of the defendant's performance of the contract stated

1837.

MORGAN v. PEBBER.

therein, and also an averment of the plaintiff's non-performance of a condition precedent; that it amounted to the general issue, alleging and setting up a contract different from and inconsistent with the implied contract stated in the several counts of the declaration which it professed to answer; and that it tendered an issue upon various matters of defence.

As to the eighth plea.

Bayley (*Ogle* was with him), in support of the demurrer.—The eighth plea is clearly bad: a simple wager is not void at common law. In *De Costa* v. *Jones*, Cowp. 729, it was laid down that a wager may generally be considered as legal, unless it be laid upon subjects tending to excite a breach of the peace, or which are contra bonos mores, or affect the interests or feelings of third persons, or which expose a third person to ridicule. The principle there laid down was adopted in *Good* v. *Elliott*, 3 T. R. 693, and has been repeatedly recognized since, even down to the last term. The only question, therefore, in this case, is, whether the contracts declared upon are against sound policy or in contravention of any statute. The point was incidentally determined by this court in *Wells* v. *Porter*, 3 Scott, 141, 2 New Cases, 722, and *Oakley* v. *Rigby*, 3 Scott, 194, 2 New Cases, 732, and by the court of Exchequer in the last term, in *Elsworth* v. *Cole*, 2 M. & Welsby, 31. In *Forster* v. *Thackery*, 1 T. R. 57, n., the court doubted whether a wager upon the time within which war would be declared against a foreign country was legal. In *Jones* v. *Randall*, Lofft, 383, Cowp. 17, an equal wager between the parties upon the event of a suit, not being a contempt of court, was held to be neither immoral nor illegal, where intended in some degree as an indemnification. But, in *Allen* v. *Hearn*, 1 T. R. 56, a wager between two voters with respect to the event of an election of a member to serve in parliament, laid before the poll began, was held to be void, as tending to incite to bribery. So, in *Atherfold* v. *Beard*, 2 T. R. 610,

1837.

MORGAN v. PEBRER.

a wager respecting the amount of any branch of the public revenues was held illegal, as leading to an improper discussion, and being contrary to sound policy. There is nothing, however, in a wager such as the present is assumed to be—a wager upon the future price of *foreign* funds—that is at all contrary to public policy.

As to the thirteenth plea.

The thirteenth plea (to the indebitatus counts) is bad on two grounds—first, that it amounts to the general issue—secondly, that it is double. By the new rules, non assumpsit puts in issue all the facts necessary to raise the promise alleged. Here, the defendant sets up a conditional contract by way of answer to the positive contract declared on. In *Jones* v. *Nanney*, 1 M. & Welsby, 333, in assumpsit for work and labour by the plaintiff as an attorney, a plea, that, as to all but 90*l.*, the work and labour was performed by the plaintiff in endeavouring to secure the defendant's return to parliament on two occasions, under an agreement, on the first occasion, that the plaintiff should receive no remuneration, but only his disbursements, that no express contract was made between the plaintiff and defendant on the second occasion, and that 90*l.* was a fair remuneration for the plaintiff's services on that occasion, was held bad on special demurrer, as amounting to the general issue. "You rebut," says Lord Abinger, C. B., arguendo, "the implied promise alleged in the declaration, and state a special contract: that amounts to non assumpsit." And Parke, B., says: "All the statement in this plea is matter of evidence that there was no contract express or implied." That is precisely this case. In *Groundsell* v. *Lamb*, 1 M. & Welsby, 352, in assumpsit for goods (a machine) sold and delivered, it was held that the defendant might shew under the general issue that the machine was manufactured by the plaintiff for the defendant under a condition, that, if it did not work, nothing should be paid for it; that it could not be made to work; and that it was useless to the defendant.—The general rule is,

Amounting to non assumpsit.

1837.

MORGAN v. PEARER.

Bad for duplicity.

that, where two distinct facts are relied on, either of which would by itself afford a complete answer to the action, they cannot be joined in the same plea. Here, the defendant in his thirteenth plea alleges a general performance, and then goes on to allege in detail how his part of the contract has been performed, and that the plaintiff violated his part of the contract, by sale of the stock without notice. This mode of pleading presents a great difficulty in the way of the plaintiff's replication: he could not select a single fact without admitting many others that would materially embarrass his case at the trial; and he could not reply de injuriâ, for that only applies where the plea admits the promise alleged in the declaration, and avoids it by matter ex post facto—*Whittaker* v. *Marson*, 2 Scott, 567, 2 New Cases, 259, *Griffin* v. *Yates*, 2 Scott, 845, 2 New Cases, 579: whereas, here, the facts pleaded go to shew that no such promise as that alleged in the declaration was ever made.

As to the eighth plea.

Gale, contra.—The eighth plea, upon which the main question arises, shews that the contract declared on is illegal on two grounds—first, as a wager void at common law—secondly, as a wager prohibited by the statute 14 Geo. 3, c. 48. The contract is against public policy, and therefore void by the common law, inasmuch as it has a natural tendency to incite to the commission of acts injurious to the government of a country alleged in the plea to be in amity with this country. In *Gilbert* v. *Sykes*, 16 East, 150, a wager by which the defendant received from the plaintiff 100 guineas on the 31st May, 1802, in consideration of his paying the plaintiff one guinea a day as long as Napoleon Buonaparte, then first consul of the French republic, should live (which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise), was held to be void on the grounds of immorality and impolicy. The law of

Contract void at common law.

this country respects the rights and interests of friendly powers, as appears from the prosecution of Peltier for a libel on Buonaparte; as also from a case that occurred during the Attorney-Generalship of Lord Eldon, where four individuals were tried and convicted of publishing a libel on the Emperor of Russia. Here, the wager has a direct tendency to incite the plaintiffs to endeavour to depreciate the public funds of a country in amity with England.—The contract in question is within the prohibition of the statute 14 Geo. 3, c. 48. That statute, after reciting that "it had been found by experience that the making insurances on lives *or other events* wherein the assured shall have no interest, had introduced a mischievous kind of gaming," for remedy thereof, enacts, "that, from and after the passing of the act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or *on any other event or events whatsoever*, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever." In *Atherfold* v. *Beard*, 2 T. R. 610, Buller, J., said: "Either the courts must restrain that act of parliament to such cases as in form are policies, which would entirely repeal the statute, or, by pursuing the spirit of the act, extend it to all cases. I think the latter is the true construction: for, a policy is but a promise." [*Tindal*, C. J.—In *Good* v. *Elliott*, 3 T. R. 693, a wager that A. had purchased a wagon of B., was held to be neither void at common law nor prohibited by the statute 14 Geo. 3, c. 48. If the law were as it is now contended, there was no necessity for the stock-jobbing act.] In *Paterson* v. *Powell*, 9 Bing. 320, 2 M. & Scott, 399, an engagement, in consideration of forty guineas, to pay 100*l.* in case Brazilian shares should be done at a certain sum on a certain day, sub-

Void by the 14 Geo. 3, c. 48.

1837.

MORGAN v. PEBBER.

scribed by several persons, each for themselves, was held to be a policy of insurance within the 14 Geo. 3, c. 48, and void.

As to the thirteenth plea.

The 13th plea is not bad for the reasons assigned. It is not double: the whole together amounts but to one defence; and there is nothing in *Whitaker* v. *Marson* and *Griffin* v. *Yates* to prevent the plaintiff from putting the whole in issue by replying de injuriâ. Nor is the plea bad as amounting to the general issue. In *Gregory* v. *Hartnoll*, 1 M. & Welsby, 183, to an action of assumpsit for money paid, the defendant pleaded—that the money was paid by the plaintiff to the use of the defendant in manner thereinafter mentioned, and in no other manner, viz., as to one sixteenth part of the damages and costs recovered against the plaintiff as owner of a vessel of which the defendant was a part-owner to the extent of one sixteenth share, for the loss of certain goods shipped on board the vessel, and which loss was alleged in the action to have happened through the negligence &c. of the plaintiff by his mariners and servants, whereas the loss complained of was not wholly caused by the negligence &c. of the plaintiff by his mariners and servants, but that the plaintiff, by his own personal and wilful misconduct, &c., contributed to the loss—and further, that, although he was the legal owner of one-sixteenth part of the vessel, yet he, the defendant, did not concur with the plaintiff and the other part-owners in the employment of the vessel in that voyage, but that the voyage was undertaken and carried on for the profit and advantage of the plaintiff and certain other persons separate and distinct from the defendant, and without his being concerned or in any way participating in the adventure: and it was held, on special demurrer, that both those pleas were bad as amounting to the general issue. But there, as in the cases cited on the part of the plaintiff, the plea did not admit a primâ facie case. Here, however, the plea gives implied colour to the plaintiff, by admitting a primâ facie

case, and avoids the effect of that case by shewing new facts. In *Carr* v. *Hinchliffe*, 7 D. & R. 42, 4 B. & C. 547, where, in assumpsit for goods sold and delivered, the defendant pleaded that the goods had been sold to him by an agent of the plaintiff without disclosure of the principal, and claimed a set-off against the agent, Littledale, J., says: "The facts alleged in the defendant's special plea might have been given in evidence under the general issue, and would in that way have been a good defence to the action: but the question is, whether the same facts stated on the record do or do not constitute a good plea. The plea does not deny the plaintiff's right of action; on the contrary, it admits a prima facie right (which in trespass would be called giving colour), and then avoids it by shewing a debt of a larger amount due to the defendant from the plaintiff's agent and factor. The same facts shew the plea to be matter of law, for, the action is defeated by the legal right to set up the agent's debt as an extinguishment of that due to the plaintiff." Many defences are now required to be specially pleaded which before the rules of Hilary Term, 4 Will. 4, might have been given in evidence under the general issue; as, in trover, the plaintiff's title to the goods, and, in trespass, his possession or right of possession of the locus in quo—*Heath* v. *Milward*, 2 Scott, 160. [*Tindal*, C. J.—By the rules referred to, Title I, *Assumpsit*, 1, it is provided, that, "in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." The question here is whether the particulars stated in the thirteenth plea do not amount to a mere denial of the matters of fact from which the promise alleged in the declaration may be implied by law.]

Bayley, in reply, was stopped by the court.

1837.

MORGAN v. PEBRER.

As to the eighth plea.

TINDAL, C. J.—It appears to me that neither of these pleas is sustainable. The question raised by the eighth plea is, whether the contract declared upon was void as a wager by the common law, or prohibited by the statute 14 Geo. 3, c. 48. It appears to me, that, unless we are prepared to arrive at a conclusion directly at variance with the decision in *Good* v. *Elliott* and in several subsequent cases, we cannot hold a wager on the future price of foreign stocks to be bad at common law. At common law, wagers are not illegal: they only become so when they are contrary to sound policy, or tend to a breach of law or morals. I am unable to perceive that the wager in question is one the fair consequence of which may be said to be, either to involve this country with any foreign state, or in any way to interfere with the administration of affairs here. No case is to be found in the books in which a simple wager has been held to fall within the prohibition of the statute 14 Geo. 3, c. 48. That statute relates to *insurances* on lives, or on other events wherein the person or persons for whose use, benefit, or on whose account such *policy* shall be made shall have no interest. If a simple wager be not invalid on other grounds, I cannot see why, the transaction being wholly unconnected with a policy, it should be held to be within the statute.—The thirteenth plea is clearly bad as amounting to the general issue. It sets out a contract between the plaintiffs and defendant for the purchase by the former on account of the latter of certain Spanish bonds and Spanish scrip, under which contract the bonds and a sum of money were to be deposited with the plaintiffs by way of security, the deposit to be increased upon a fall in price of the stock so purchased, and the plaintiffs to be at liberty, should the defendant, upon due notice being given to him of the fall in price of the stock, neglect proportionally to increase the amount of the deposit, to sell the bonds and apply the proceeds to the repayment of the advances made by them for the de-

As to the thirteenth plea.

fendant in respect of the contract: the plea then avers that the defendant made the stipulated deposit, and that the plaintiffs, in violation of their agreement, sold the bonds, without having given the defendant notice of any depreciation or fall in their value. What is that in effect but saying that the parties had entered into a special contract at variance with the implied contract declared upon: non assumpsit would put in issue all the facts from which the promise alleged might be implied by law. The plaintiffs must have judgment.

PARK, J.—We could not hold this to be a wager void either at common law or by the 14 Geo. 3, c. 48, without overturning *Good* v. *Elliott*, where it was held that a wager that A. had purchased a waggon of B., was not void at common law, nor prohibited by the statute. The contract in this case involves none of the grounds of immorality or of impolicy as affecting the interests of this or of any foreign country, which, according to all the authorities, would make it a void wager. The title of the 14 Geo. 3, c. 48, is, "an act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured." These words, or those of the preamble, though strong, will not control the enacting words, which carry it considerably further. But still the statute clearly does not apply to a case like the present, but only where the contract is in the form of a policy. Upon the other point also, I agree with my Lord Chief Justice.

VAUGHAN, J.—I am of the same opinion upon both points. No case ever underwent more serious discussion than did *Good* v. *Elliott*. Lord Kenyon, and Grose, J., laid it down that the statute 14 Geo. 3, c. 48, applied only to the case of a policy. Generally speaking, wagers are

1837.

MORGAN v. PEBRER.

legal: they only become illegal when the subject-matter of them is contrary either to public policy, or to morality, or where the interests and feelings of third persons are affected, or where their tendency is injurious to the policy of our own or of any foreign government in amity with us. The contract in the present case clearly does not fall within either of the recognized exceptions. It is a wager in its nature perfectly innocent, and unaffected by the statute.

Judgment for the plaintiffs.

Monday, Jan. 23rd.

Case lies against a man for negligently and improperly keeping a stack of hay put together in such a state as to be likely to ignite, and which eventually does ignite, and his neighbour's premises are injured.

At the trial the judge told the jury that the question for them to consider, was, not whether the defendant had acted according to the best of his skill and judgment in the adoption of measures calculated to avert the threatened danger, but whether he had acted with such a reasonable degree of caution as a prudent and careful man might have been expected to exercise; and that, if they thought the defendant had not acted with reasonable care and prudence, but had been guilty of gross negligence, the plaintiff was entitled to a verdict:—Held, that this direction was substantially correct.

VAUGHAN *v.* MENLOVE.

THE declaration stated, that, before and at the time of the grievance and injury thereinafter mentioned, certain premises, to wit, two cottages, with the appurtenances, situate in the county of Salop, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff, to wit, one thereof in the possession and occupation of one Thomas Ruscoe as tenant thereof to the plaintiff, the reversion of and in the same, with the appurtenances, then belonging to the plaintiff, and the other thereof in the possession and occupation of one Thomas Bickley as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff; that the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch, also near to the said cottages; and that the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, or put together, and then standing and being in and upon the said close of the defendant: that,

1837.

VAUGHAN v. MENLOVE.

on the 1st August, 1835, while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, take fire, and break out into a flame, and there had appeared and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into a flame; and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then was and continued dangerous to the said cottages; of which said several premises the defendant then had notice: yet the defendant, well knowing the premises, but not regarding his duty in that behalf, on, &c., and from thence until and upon a certain day, to wit, on &c., wrongfully, negligently, and improperly, kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages, although he could, and might, and ought to have removed and altered the same, so as to prevent the same from being and continuing so dangerous as aforesaid; and by reason thereof the said cottages for a long time, to wit, during all the time aforesaid, were in great danger of being consumed by fire: that, by reason of the premises, and of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack in a state or condition so dangerous as aforesaid, and so liable and likely to ignite and take fire and break out into flame, on &c., and while the said cottages so were occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff, the said rick or stack of hay of the defendant, standing in the close of the defendant, and near the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant, so being of wood and thatch as aforesaid, and so being near to the said rick or

1837.

VAUGHAN v. MENLOVE.

stack as aforesaid, were set on fire; and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame, so occasioned as aforesaid by the igniting and breaking out into flame of the said rick or stack, was thereupon then communicated unto the said cottages in which the plaintiff was interested as aforesaid, which were thereby then respectively set on fire, and then, to wit, on &c., by reason of such carelessness, negligence and improper conduct of the defendant in so continuing the said rick or stack in such a dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being of great value, to wit, of the value of 500*l.*: and by means of the premises, the plaintiff was greatly and permanently injured in his said reversionary estate and interest of and in each of them: to the plaintiff's damage of 500*l.*

Pleas.

The defendant pleaded—first, not guilty—secondly, that the said rick or stack of hay was not likely to ignite, take fire, and break out into flame, nor was the same, by reason of such liability, and of the state or condition of the said rick or stack of hay, dangerous to the said cottages, nor had the defendant notice of the said premises, in manner and form as the plaintiff had in and by his declaration in that behalf alleged—thirdly, that the defendant did not, well knowing the premises in the declaration in that behalf mentioned, wrongfully, negligently, or improperly keep or continue the said rick or stack of hay in a state and condition dangerous to the said cottages—fourthly, that the said rick or stack of hay did not by reason of the carelessness, negligence, and improper conduct of the defendant in that behalf, ignite, take fire, and break out into flame—fifthly, that the said cottages were not consumed, damaged, and destroyed by reason of the carelessness, negligence, and improper conduct of the defendant.

1837.

VAUGHAN v. MENLOVE.

At the trial, before Patteson, J., at the last Summer Assizes at Shrewsbury, the facts that appeared in evidence were as follow:—The plaintiff was possessed of certain cottages adjoining a barn and stables belonging to the defendant. A rick of hay also belonging to the defendant was placed close to the barn. In consequence of its having been stacked in too green a condition, the hay exhibited unequivocal symptoms of approaching combustion—smoking or steaming very considerably, and emitting an offensive smell. The defendant was repeatedly warned by several of his neighbours as to the probable consequences of permitting the stack to remain in its then state; some advising one course, and some another: but his only answer was, that "he would chance it." Ultimately, however, the defendant caused a hole to be cut through the centre of the rick; which, according to the opinions of some of the witnesses, hastened the catastrophe: they all agreed that it was done at too late a period to be of any avail. The rick at length burst into a flame, which communicating to the barn and stables of the defendant, spread thence to the plaintiff's cottages, and burned them to the ground.

The learned judge told the jury, that, under the circumstances, the question for them to consider, was, not whether the defendant had acted according to the best of his skill and judgment in the adoption of measures calculated to avert the threatened danger, but whether he had acted with such a reasonable degree of caution as a prudent and careful man might have been expected to exercise; and that, if they thought the defendant had not acted with reasonable care and prudence, but had been guilty of gross negligence, the plaintiff was entitled to a verdict. The jury returned a verdict for the plaintiff—damages, 5*l*.

Maule, in the last term, moved for a rule nisi for a new trial, on the ground of misdirection.—He submitted that

1837.

VAUGHAN v. MENLOVE.

the sole question for the jury was, whether or not the defendant had been guilty of such gross and palpable negligence as to shew that the act of which the plaintiff complained was clearly wrongful; that, if the defendant acted to the best of his own individual skill and judgment, nothing more was required of him; that this was not like the case of negligently *keeping* a fire, nor like that of a bailee taking insufficient care of property entrusted to him by another, but rather like the case of a man keeping a ferocious dog, who is not liable for an injury done by the dog, unless he had previously, to the knowledge of his owner, evinced a disposition to bite, and the owner had neglected properly to secure him. [*Bosanquet*, J.—The course that a reasonably prudent and careful man would adopt is the criterion in the case of a fire kept in a house; the same principle must govern this case.]

The point being a new one, the court with some hesitation granted a rule nisi.

Talfourd, Serjeant, and *Whateley*, shewed cause.—The action is founded upon principles of law as to which there can be difficulty: nor is the direction of the learned judge liable to exception. Whether the rick was fired by the hand of the defendant or in consequence of his negligence in putting it together in a dangerous state, makes no difference. In a case that was tried at the Assizes for Berkshire a year or two since, before Alderson, J., the defendant, in burning couch in his field, set fire to and destroyed a plantation adjoining; and he was held to have acted with negligence, and consequently to be liable to an action: it was never suggested that the action did not lie. Here, the defendant, though repeatedly warned of the dangerous state of the rick, did nothing to prevent a consequence that any man of ordinary understanding must have anticipated; but contented himself with saying

that "he would chance it." He was clearly guilty of *gross* negligence. In *Thomas* v. *Morgan*, 4 Dowl. 223, 2 C. M. & R. 496, it was held, that, in case for an injury done to the plaintiff's cattle by the defendant's dogs, the plea of not guilty put in issue the fact not only that the defendant's dogs injured the plaintiff's cattle, and that the dogs were of a savage disposition, but also that the defendant *knew* them to be so.

R. V. Richards, contrà.—This is a case of the first impression. The learned judge's direction was clearly erroneous: it is evident from the whole tenor of it what he meant when he spoke of gross negligence. The case in Berkshire was clearly a case of negligence, and has no analogy to the present: the injury was caused by an act done by the defendant or his servants. What is or is not gross negligence, can only be properly estimated by reference to the individual skill and judgment of the party. The degrees of prudence are as various as are men's tempers and dispositions. That which is done unintentionally, cannot be wrongful. [*Tindal*, C. J.—Is my property to be defended by a different rule of law in the case of a man habitually careless, from that which would apply in reference to a prudent person?] In *Crook* v. *Jadis*, 3 N. & M. 257, 5 B. & Ad. 918, Patteson, J., says: "I never could understand what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man:" and Taunton, J., added: "I cannot estimate the degree of care which a prudent man should take." In *Foster* v. *Pearson*, 1 C. M. & R. 849, which was an action to recover the amount of certain bills of exchange, the question was whether the plaintiffs had taken the bills under such circumstances as entitled them to sue upon them. It was left to the jury to say whether the plaintiffs took the bills with due care and caution, and in the ordinary course of business. The jury having found

1837.

VAUGHAN v. MERLOVE.

that they did, Parke, B., in delivering the judgment of the court, upon a motion for a new trial, said: "Of the mode in which the question was left, the defendant has certainly no right to complain; but, if the verdict had been in his favour, it would have become necessary to consider whether the learned judge was correct in adopting the rule first laid down by the court of Common Pleas in the case of *Snow* v. *Peacock*, 11 Moore, 286, 3 Bing. 406, and which was founded upon the dicta rather than the decision of the King's Bench in the case of *Gill* v. *Cubitt*, 5 D. & R. 324, 3 B. & C. 466; more especially since the opinion of the latter court has been so strongly intimated in the late cases of *Crook* v. *Jadis*, and *Backhouse* v. *Harrison*, 3 N. & M. 188. The rule of law was long considered as being firmly established, that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a bonâ fide holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been treated as essential to the validity of his title besides and independently of honesty of purpose. It is unnecessary, however, to decide that question at present; when it arises, as it will probably do under the new rules of pleading, on the record itself, it will be proper that it should be considered and finally decided with due deliberation." A man cannot be said to be guilty of *gross* negligence, where he is doing that which, according to the best of his individual skill and judgment, seems to be the most prudent course the circumstances will admit of. The fact of the defendant's stack being placed at the extremity of his own soil, clearly does not in any degree militate against him; for, he had a clear right, according to the case of *Wyatt* v. *Harrison*, 3 B. & Ad. 871, so to place it.

1837.

VAUGHAN v. MENLOVE.

TINDAL, C. J.—I agree that this is a case of the first impression: but I feel no difficulty in the application to it of the principle upon which the determination of it must rest. This is neither a case of contract nor a case of bailment, where the degree of care which the party is called upon to exert is measured by the nature and character of the bailment. But the case falls within the general rule of law which requires that a man shall so use his own property as not to injure or destroy that of his neighbour, and which renders him liable for all the consequences resulting from the want of due care and caution in the mode of enjoying his own. Under the particular circumstances of this case, I feel no hesitation in holding the defendant to have been as much the raiser of the fire as if he had put a lighted match to the hay-rick; for, it is well known that hay stacked in a green or damp condition will from natural causes ferment and ignite. In *Tubervil* v. *Stamp*, an action was held to be maintainable under circumstances very similar to those of the present case:—"Case on the custom of the realm, quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada quer. in quodam clauso ipsius quer. combusta fuerunt. After verdict pro quer., it was objected, the custom extends only to fire in a house or curtilage (like goods of guests), which are in his power. Non alloc.; for, the fire in his field is his fire, as well as that in his house: he made it, and must see that it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another. But, if a sudden storm had arisen, which he could not stop, it was matter of evidence, and he should have shewed it. And Holt, Rokesby, and Eyre, against the opinion of Turton, who went upon the difference between fire in an house, which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment, according

1837.

VAUGHAN v. MENLOVE.

to the opinion of the other three." Put the case of a chemist, mixing substances which alone are perfectly innocent, but which are liable to explode on coming into contact, and thereby occasioning damage to his neighbour; who could for a moment doubt that the injured party would have a remedy by action? I am clearly of opinion that the damage in this case was properly the subject-matter of an action. But it is contended that the learned judge mistook the extent of the defendant's liability; and that, under the particular circumstances of this case, the defendant was not bound to adopt such measures as a man of ordinary prudence would have resorted to for the purpose of averting the threatened danger: but that it was sufficient if he acted according to the best of his own individual judgment; and therefore that the learned judge ought not to have left the case to the jury as one of gross negligence, but should have left it to them to say whether or not the defendant had acted honestly and bona fide according to the best of his judgment. The first observation that suggests itself, in answer to that argument, is, that, seeing the infinite gradations of intellect and judgment, the doctrine contended for would lead to an inconvenient vagueness and uncertainty in a case which perhaps more than all others requires that the rights and liabilities of the parties should be well and accurately defined. It is said that there is nothing intelligible in the rule which has in many cases obtained, requiring from a party under circumstances analogous to those of the present case the exercise of that degree of care which a prudent and cautious man would be expected to use. Such, however, has always been the rule in cases of bailment, as laid down by Lord Kenyon in *Cogge* v. *Barnard*, 2 Lord Raym. 909, though in some cases of bailment a smaller, in others a greater degree of diligence and care are exacted. That learned judge says: "In the second sort of bailment, viz. commodatum, or lending gratis, the borrower is bound to

the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so, if the bailee be guilty of the least neglect, he will be answerable; as, if a man should lend another a horse, to go westward, or for a month; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him: but, if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse." It is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man: and such was in substance the direction of the learned judge. To hold the degree of care to be sufficient if co-extensive with the judgment of the individual, would introduce a rule as uncertain as it is possible to conceive. In the present case, it appears to me that the defendant, not only failed to observe the degree of care and caution that the law required of him, but was guilty of very gross negligence. I therefore think the rule must be discharged.

PARK, J.—I am of the same opinion. Although the facts in this case are novel, they clearly bring it within the rule of law that a man shall so use his own property as not to do injury to his neighbour. The case of *Tubervil* v. *Stamp* is in principle very like the present, though in its circumstances more like the case that was tried in Berkshire, as alluded to by my Brother Talfourd. The direction of the learned judge seems to me to be perfectly correct. It clearly was proper to leave it to the jury to say whether or not the defendant was guilty of gross negligence; and I think their finding was well warranted by the evidence.

1837.

VAUGHAN v. MENLOVE.

GASELEE, J.—My Lord Chief Justice and my Brother Park having gone so fully into the matter, it is not necessary for me to say more than that I entirely concur with them. The action is clearly consistent with the principle upon which the decisions referred to turned.

VAUGHAN, J.—The principle upon which we hold this action to be maintainable is by no means new. It is at least as old as *Tubervil* v. *Stamp*. It has been strenuously urged that the law cast no duty upon the defendant under the circumstances. To that, however, I cannot agree. It clearly was his duty, whilst enjoying his own premises, to take care that his neighbour was not injured by any act or neglect of his. It appears to me that the defendant's conduct was such that no jury would be warranted in coming to any other conclusion than that he had been guilty *of gross* negligence: for, when the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state, were pointed out to him, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that "he would chance it." That which might be expected under the circumstances to have been the conduct pursued by a prudent and careful man has always been taken for the criterion in cases analogous to the present. For example, in actions on policies of assurance, where the ship or goods, the subject-matter of the adventure, have been sold by the master for the benefit of the concerned, the question left to the jury has invariably been, whether or not the course pursued by the master has been such as a prudent and cautious man, having a due regard to the interests of all parties, ought under the particular circumstances to have adopted. In this case I think the jury would not have found for the plaintiff, unless they had been

satisfied that the defendant had been guilty of gross negligence; a conclusion to which all the evidence directly pointed.

Rule discharged (*a*).

(*a*) See Smith v. Brampton, Salk. 644, 5 Mod. 87, nom. Smith v. Crumpton.

STEVENS *v.* WILLINGALE.

Monday, Jan. 23rd.

Where the particular of demand is so framed as to be calculated to mislead the defendant, the court will grant a new trial.

THIS was an action of debt for money lent and for money alleged to be due upon an account stated. The defendant pleaded that he was never indebted. The plaintiff by his particular demanded 50*l.* for cash lent; and at the trial, before Parke, J., at the Sittings at Westminster in the last term, he rested his case upon the evidence of one Welsh, who stated, that, about two years since, he was at a public-house in Aldgate, in company with the plaintiff and defendant; that he heard the plaintiff ask the defendant when he intended to pay him the 50*l.* he had lent him; and the defendant gave the plaintiff an order for 50*l.* upon one Fisher, who the defendant alleged was indebted to him to that amount. The defence was, that no money in fact was ever lent by the plaintiff to the defendant; but that the sum sought to be recovered was the amount of a bet upon a horse-race. The particular being equally applicable to both counts, it was contended on the part of the defendant, that, the plaintiff having rested his demand upon "cash lent," he was not entitled to recover in respect of any thing else.

A verdict having, under the direction of the learned judge, been taken for the plaintiff, with a reservation of leave to the defendant to move to enter a nonsuit—

Talfourd, Serjeant, in the course of the last term, moved accordingly.—He contended, that, the particular giving a false character to the foundation of the transaction,

1837.

STEVENS v. WILLINGALE.

and thereby misleading the defendant, and preventing him from pleading that the account alleged to have been stated by him with the plaintiff arose out of an illegal wager, the plaintiff ought to have been nonsuited.

Andrews, Serjeant, now shewed cause.—There is no foundation for this rule. Assuming that the particular was informal, the plaintiff is not therefore to be deprived of his right to recover, unless the informality were such as to be calculated to mislead the defendant, and the defendant shews that he was actually misled by it.

TINDAL, C. J.—I think the justice of the case will be attained by directing a new trial, on payment of costs by the plaintiff, he amending his particular, and the defendant having liberty to plead de novo.

The rest of the court concurring—

Rule accordingly.

Tuesday, Jan. 24th.

A distringas cannot issue after the expiration of the writ of summons.

ABBOTTS *v.* KELLY.

BAYLEY, on a former day, obtained a rule calling upon the plaintiff to shew cause why the writ of distringas issued herein should not be set aside for irregularity; the irregularity complained of was, that the distringas had issued more than four months after the date of the writ of summons—2 Will. 4, c. 39, s. 10; *Lemon* v. *Lemon*, 2 Scott, 506.

Talfourd, Serjeant, contrà, submitted that *Lemon* v. *Lemon* was the case of an application for leave to issue a distringas; and urged the inconvenience of the rule there laid down, arising out of the difficulty of serving the defendant within the prescribed period.

TINDAL, C. J.—The difficulty suggested may be obviated by continuing the writ by alias and pluries. The

1837.

ABBOTTS v. KELLY.

object of the distringas being to enable the plaintiff either to enter an appearance or to proceed to outlawry, neither of which can be done after the expiration of the first process, I think this distringas has improperly issued. The case of *Lemon* v. *Lemon* is in point, and seems to me to accord with good sense. The rule must be made absolute; but, inasmuch as the affidavits on which it was obtained are unnecessarily lengthy, it must be without costs.

The rest of the court concurring—

Rule absolute accordingly.

NORRIS *v.* SALOMONSON.

Tuesday, Jan. 24th.

The drawer of a bill being asked if he was aware that the bill had been dishonoured, answered: "Yes: I have had a very civil letter from Mr. G. on the subject; and I will call and arrange it." In an action against the drawer—Held, that the above admission relieved the plaintiff from the necessity of proving a regular notice.

THIS was an action of assumpsit on a bill of exchange, by an indorsee against the drawer. The only evidence of notice of the dishonor of the bill by the acceptor was that of a witness who deposed, that, in reply to an inquiry made by him of the defendant as to whether or not he was aware of the fact of the bill having been dishonored, said—"Yes: I have had a very civil letter on the subject from Mr. Gunnell (an intermediate indorsee); and I will call and arrange it." It was submitted, on the part of the defendant, that this was not sufficient evidence of a legal and formal notice of dishonor of the bill, to charge the drawer. Arabin, Serjeant, before whom the cause was tried at the Sheriff's court in London, over-ruled the objection; and the jury returned a verdict for the plaintiff.

Gaselee now moved for a new trial, on the ground of misdirection; relying upon the rule laid down in *Hartley* v. *Case*, 6 D. & R. 505, 4 B. & C. 339, 1 C. & P. 555, and *Solarte* v. *Palmer*, 5 M. & P. 475, 7 Bing. 530; S. C., in error, 1 Scott, 1.

1837.

NORRIS v. SALOMONSON.

TINDAL, C. J.—*Hartley* v. *Case* and *Solarte* v. *Palmer* are clearly distinguishable from the present case: there the objection was to the form of the notice. Here, however, the effect of the notice is taken from the defendant himself. The case, therefore, seems to me to fall within those where a regular notice has been waived, or the proof of it at the trial dispensed with by reason of the drawer's own conduct (*a*). The defendant admitted that he had received a notice of dishonor. The question having gone to the jury, I think we ought not to disturb their verdict.

The rest of the court concurring—

Rule refused (*b*).

(*a*) See Anson v. Bailey, Bull. N. P. 276; Blesard v. Hirst, 5 Burr. 2670; Hopes v. Alder, 6 East, 16; Lundie v. Robertson, 6 East, 231; Taylor v. Jones, 2 Camp. 105; Gibbon v. Coggan, 2 Camp. 188; Phipson v. Kneller, 4 Camp. 285, 1 Stark, 116; Brett v. Levett, 13 East, 213, 1 Rose, 102; Horford v. Wilson, 1 Taunt. 12; Margetson v. Aitken, 3 C. & P. 338; Wilkins v. Jadis, 2 B. & Ad. 188, 1 M. & Rob. 41.

(*b*) See Boulton v. Welsh, post, Easter Term, 7 Will. 4, 3 New Cases, 688.

Tuesday, Jan. 24th.

MASSEY and Another *v.* The Rev. JOHN NANNEY, Clerk.

By a marriage settlement, the defendant, in consideration of the marriage, of 4,000*l.* advanced by the father of the intended wife as a marriage portion, and of the natural love and affection which the defendant bore towards his nephew, the intended husband, covenanted to pay an annuity of 800*l.* a year to plaintiffs, to the use of the intended husband and wife, during their joint lives:—Held, that the deed did not require an ad valorem stamp, as upon the sale of an annuity, the purchase money for which amounted to 4,000*l.*

Held, also, that the deed need not be inrolled under the 53 Geo. 3, c. 141, s. 2.

The non-inrolment of an annuity deed under the statute, cannot be taken advantage of under non est factum.

THIS was an action of covenant for arrears of an annuity secured by a marriage settlement.

The declaration stated, that, on the 16th July, 1828, by an indenture made between the defendant of the first part, Robert Chambre Vaughan of the second part, The Hon. Edward Massey and Anna Massey of the third part, and the plaintiffs of the fourth part—reciting, that a marriage had been agreed upon and was then intended to be solemnized

between the said R. C. Vaughan and Anna Massey, with the consent of her father, the said E. Massey; that, upon the treaty for the said marriage, and in consideration thereof, and of the sum of 4,000*l.*, which E. Massy had agreed to advance as a portion for his daughter, the defendant had agreed to enter into the covenant and agreement thereinafter contained for securing the payment of the annuities or yearly sums thereinafter mentioned, upon the trusts thereinafter declared concerning the same—it was witnessed, that, in pursuance of the said agreement, and in consideration of the then intended marriage and of the portion or portions which the said R. C. Vaughan would receive with the said Anna Massey, and also in consideration of the natural love and affection which the defendant bore towards his nephew, the defendant did thereby, for himself, his heirs, executors, and administrators, covenant with the plaintiffs in manner following—that, in case the said marriage should be solemnized, the defendant, his heirs, executors, or administrators, would thereupon pay to the plaintiffs, or the survivor of them, his executors or administrators, during the joint lives of them the said R. C. Vaughan and Anna Massey, the clear yearly sum of 800*l.* of lawful money of Great Britain, by equal half-yearly payments, free from all deductions whatsoever; the first payment thereof to be made at the expiration of six calendar months from the day of the solemnization of the said then intended marriage, in trust for and for the use of the said R. C. Vaughan and Anna Massey, and to be paid to him, or to such person or persons and in such manner as he should direct.—Averment, that the intended marriage took place &c.—Breach, that, although six calendar months had elapsed since the day of the solemnization of the said marriage, yet the defendant had not well and truly paid or caused to be paid to the plaintiffs, during the joint natural lives of them the said R. C. Vaughan and Anna his wife, the clear yearly sum of

1837.

MASSEY v. NANNEY.

800*l.* of lawful money of Great Britain, by equal half-yearly payments, free from all deductions whatsoever, or otherwise howsoever.

Plea—non est factum.

At the trial, before Park, J., at the Sittings in the present term, the marriage settlement above set forth appeared to bear a 1*l.* 15*s.*, a 12*l.*, and a 5*l.* stamp. For the defendant, it was objected, that the deed, being a contract for the sale of an annuity, the consideration for which was 4,000*l.*, should have been impressed with a 45*l.* stamp; and that it should have been inrolled.

A verdict having been taken for the plaintiffs, subject to a motion to enter a nonsuit on the above objections—

First point.

Alexander now moved accordingly.—By the 55 Geo. 3, c. 184, sched. part 1, it is enacted, that, upon every "Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction—where the purchase or consideration money therein or thereupon expressed shall amount to 4,000*l.*, and shall not amount to 5,000*l.*"—the stamp-duty shall be 45*l.* Here, part of the consideration for the grant of the annuity was a sum of 4,000*l.* advanced by Edward Massey.

Second point.

Then, by the 53 Geo. 3, c. 141, s. 2, it is enacted, "that, within thirty days after the execution of every deed, bond, instrument, or other assurance whereby any annuity or rent-

charge shall be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be inrolled in the high court of Chancery, &c.; otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes." This deed should, at all events, have been inrolled under the 53 Geo. 3.

TINDAL, C. J.—This is not the case of a mere dry annuity granted for a money consideration. There has been no *sale*, which there must be directly or indirectly to bring the instrument under the operation of that part of the stamp act which imposes the ad valorem duty. *Doe* d. *Manifold* v. *Diamond*, 4 B. & C. 243, 6 D. & R. 328, is precisely in point. There, a father, seised in fee of an estate, conveyed it to his son by a deed which recited that he (the father) was minded and had resolved to give and assure it to his son, as well in consideration of natural love and affection, as also in consideration of the provision which the son had that day made (by his bond) of 1500*l.* in augmentation of the portions or fortunes of his sisters; and it was held that that was not a *sale* to the son within the meaning of the 48 Geo. 3, c. 149, sched. tit. "Conveyance;" and that therefore the conveyance was not subject to the ad valorem stamp-duty. That case seems to me to govern the present.—With respect to the other point, the defendant, not having pleaded the non-inrolment, is not in a situation to avail himself of it as a defence to the action. The rule of Hilary Term, 4 Will. 4, r. II, s. 1, provides, that, "in debt on specialty, or covenant, the plea

First point.

Second point.

1837.

MASSEY v. NANNEY.

of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."

The rest of the court concurring—

Rule refused (*b*).

(*a*) See Blandy v. Herbert, 9 B. & C. 396.

WILLIAM RICHARDS and PEGGY, his Wife, Executrix of PEGGY MANLEY, Deceased, *v.* J. M. BROWNE, Executor of DENNIS WITHERS WADE, Deceased, Executrix of WILLIAM BARRY WADE, Deceased.

Wednesday, Jan. 25th.

A letter from the attorney of a creditor of testator to the attornies of his executrix, W., stating that his clients did not claim from W. payment of the debt as executrix of W. B. W. (the testator), but claimed from her individually, she having become liable, by payment of interest from time to time, to the debt:—Held, that this letter was no waiver of the creditor's right to sue W. as executrix; nor did it justify her executor in discharging a specific legacy before the debt.

THE plaintiffs declared on a promissory note, bearing date the 12th April, 1816, by which William Barry Wade, deceased, promised to pay Peggy Manley, deceased, 100*l.*, with lawful interest for the same: also on an account stated between Peggy Manley, deceased, and Dennis Withers Wade, as executrix of W. B. Wade.

The defendant pleaded—first, that, at the time of the commencement of this suit, and ever since, he had had no goods or chattels of W. B. Wade, deceased, at the time of his death, in the hands of the defendant as executor as aforesaid, or otherwise, to be administered; and also that, at the time of the commencement of the suit, and ever since, he had had no goods or chattels of the said D. W. Wade, deceased, at the time of her death, in the hands of the defendant as executor as aforesaid to be administered—secondly, no effects of the said W. B. Wade—thirdly, payment of several specialty debts due from D. W. Wade,

The simple fact of an executrix, who is entitled to a life estate in a chattel under the will, taking possession of the chattel, is not evidence of an assent by her to the bequest to him in remainder.

and allegation of others outstanding—and, lastly, full administration of all the effects of D. W. Wade, deceased.

The plaintiffs replied to the first and last pleas, that, at the commencement of this suit, the defendant had in his hands effects of W. B. Wade, deceased, at the time of his death, to be administered.

At the trial, before Bolland, B., at the Spring Assizes at Taunton, in 1836, the following facts were proved or admitted:—

The plaintiff's wife was executrix of Peggy Manley, deceased. The plaintiffs sued on a promissory note for 100*l.* given by W. B. Wade to Peggy Manley in 1816, the interest on which had been regularly paid by W. B. Wade during his life, and by D. W. Wade after his death, down to the year 1831. W. B. Wade died in 1825, bequeathing to D. W. Wade his household furniture for her life; and, after her death, to Sarah Chapple. Dennis Withers Wade died in 1832, leaving the defendant her executor. In July, 1831, James Waldron, the plaintiffs' then attorney, wrote to the defendant and his brother, on the subject of the promissory note, as follows:—

"*Richards* v. *Wade.*—As I am apprehensive you have in some measure misunderstood my clients' demand, I write you by return of post. My clients do not claim from Miss Wade payment of this money as executrix or administratrix of W. B. Wade, Esq.; but they claim from Miss Wade individually, Miss Wade having become liable, from payment of interest from time to time, to this debt."

Waldron was not called as a witness; and there was no evidence of his authority to write the letter, except that he at that time acted as the plaintiffs' attorney. The letter was not stamped; nor was there any evidence of payment made in consequence thereof. The plaintiffs had previously, in May, 1831, given the defendant and his partner, who were the attorneys of Miss Wade, the following receipt for one year's interest of the sum claimed in this action:—

1837.

RICHARDS v. BROWNE.

"1831, May 24. Received of Messrs. R. & M. Browne, by payment of Mr. James Waldron, the sum of 5*l.*, being for one year's interest of 100*l.* due from Miss Dennis Withers Wade to us on the 12th of April last."

Upon the death of W. B. Wade, Miss D. W. Wade took possession of the furniture bequeathed to her for life; and, upon her death, S. Chapple, with the consent of the defendant, took possession of the same furniture. The plaintiffs proved that that furniture was now in the hands of S. Chapple, and that it was worth 200*l.*

A verdict was thereupon found for the plaintiffs, subject to the opinion of the court on a special case, stating the above-mentioned facts.

The question for the opinion of the court was, whether, under the foregoing circumstances, the defendant was liable to pay the promissory note on which the plaintiffs sued.

Bere, for the plaintiffs.—The case admitting that a clear right of action subsisted against the maker of the note, and that he died leaving assets sufficient to satisfy the debt, the only question is, whether the plaintiffs have done anything to divest the defendant's liability, and, if so, whether the defendant is at liberty to avail himself of such a ground of defence on the present state of the pleadings. It will be contended, on the part of the defendant, that the letter of July, 1831, from the plaintiffs' attorney, Waldron, to the then attornies of Miss Wade, charging her in her individual capacity, discharged her from all claim in her representative character. Suppose an action had been brought against Miss Wade in her life-time as the personal representative of her brother, would that letter have availed her as a defence? Clearly not. The letter is perfectly unintelligible. To render her liable in her personal character, a promise in writing, founded upon an adequate consideration, was necessary. If any

such contract existed, that letter was the only evidence of it, and therefore would require a stamp. An executor paying a legacy, or permitting a legatee to take possession of chattels bequeathed, with knowledge of the existence of a superior claim, is guilty of a devastavit—Williams on Executors, 830. The defendant could not be misled; for, the case expressly finds that there was not any evidence of any payment made in consequence of it. On a plea of plene administravit, the defendant can only shew that he has duly administered: he is not at liberty to shew payment either of legacies without notice of debts, or of debts of an inferior without notice of debts of a superior order: thus, in an action against an executor for a simple contract debt of the testator, the defendant cannot excuse himself by simply shewing that he has paid legacies: he must shew that the legacies were paid without notice of the existence of the debt—*Chelsea Water Works Company* v. *Cowper*, 1 Esp. 275, *Davis* v. *Blackwell*, 9 Bing. 5, 2 M. & Scott, 7.

Erle, for the defendant.—Upon the facts stated in the case, the defendant is entitled to a judgment of nonsuit. Where a creditor has been guilty of gross laches, and by his own act has induced the executor to dispose of the assets that have come to his hands without satisfying the creditor's claim, that claim is barred. The facts of this case clearly shew that Miss Wade and the defendant were misled by the supposed abandonment by the plaintiffs of their claim against the estate of William Barry Wade; and therefore it is not competent to them to complain that legacies have been paid before their debt. The note was made in 1816; the maker died in 1825; Miss Wade, his executrix, in 1832; and the action was not commenced until 1836. Some explanation, some reason for the plaintiffs' laying by so long, should have been offered. In 1831, the present defendant, then acting as the attorney for

First point.

1837.

RICHARDS v. BROWNE.

Miss Wade, received a letter from the plaintiffs' attorney, informing him that the holders of the note elected to look to Miss Wade personally for payment. They cannot after this turn round and charge the estate. In *Skyring* v. *Greenwood*, 6 D. & R. 401, 4 B. & C. 281, 1 C. & P. 517, the plaintiff being representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current, in which they acknowledged themselves to have received, from the year 1806 to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806: and it was held that they could not in 1821 be permitted to say that this admission was made by mistake, the Board of Ordnance having in 1816 announced, that, by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it, this announcement of the board never having been communicated to the deceased by the defendants till the year 1821. Abbott, C. J., there said: "The particular fact in this case upon which my judgment proceeds, is, that the defendants were informed in 1816 that the Board of Ordnance would not allow those payments to persons in the situation of Major Skyring; but they never communicated to him that fact until 1821, having in the mean time given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance: but they forbore to do so; and they suffered him to suppose, during all the intervening time, that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income: it therefore works a great prejudice to any man, if, after having had credit given him

in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here, the defendants have not merely made an error in account, but they have been guilty of a breach of duty, by not communicating to Major Skyring the instruction they received from the Board of Ordnance in 1816, and I think, therefore, that justice requires that they shall not be permitted to recover back, or retain by way of set-off, the money which they had once allowed him in account." So, here, the plaintiffs having by the letter of July, 1831, coupled with the receipt given by them to Miss Wade in May in the same year, for a year's interest due on the note, not describing it as due from her in her representative character, treated the debt as the personal debt of Miss Wade, it is not competent to them, after this lapse of time, to assert that William Barry Wade's property, which they by their act have prevented from coming to the defendant's hands, constitutes assets for payment of the debt. *The Chelsea Water Works Company* v. *Cowper*, 1 Esp. 275, *Brooking* v. *Jennings*, 1 Mod. 174, and *Harman* v. *Harman*, 3 Mod. 115, are authorities to shew that want of notice, or any laches on the part of the creditor, will discharge an executor from liability for paying legacies before debts, or debts of an inferior before those of a higher order. *Davis* v. *Blackwell* was the case of an executor paying legacies six months after probate: it was held that he could not plead such payment in discharge of his testator's liability on a covenant.

Second point.

No assets of Major Wade, the original testator, in fact, ever came to the defendant's hands to be administered. At the time of her death, Miss Wade possessed nothing. On the decease of Major Wade, Miss Wade appropriated to herself the furniture under the bequest to her for life; and, by this assent to the specific bequest, assented to the residuary bequest to Sarah Chapple. That an assent to a

1837.

RICHARDS v. BROWNE.

specific legacy is an assent to the bequest as to the remainder-man, is to oclear to admit of argument—*Lampett's* case, 10 Rep. 47. b.; *Welcden* v. *Elkington*, Plowd. 521; *Paramour* v. *Yardley*, Plowd. 539; *Wind* v. *Jekyl*, 1 P. Wms. 572; *Doe* d. *Lord Saye and Sele* v. *Guy*, 3 East, 120. [*Vaughan*, J.—At what period is it suggested that Miss Wade was guilty of a devastavit?] When she assented to take the furniture as legatee. [*Vaughan*, J.—If the taking possession of the furniture were capable of being referred to a taking under a rightful title, why are we to infer that she took under one that was wrongful?] Her assent to take as legatee, and not as executrix, may be inferred from the circumstances. By that taking, the right to the reversion vested in Sarah Chapple, who might have sued the present defendant in trover, had he withheld the goods from her. The devastavit, therefore, if any, was committed by Miss Wade.

Bere, in reply.—The plaintiffs are not bound by Waldron's letter: he had no authority to change the situation of the parties. In *Harman* v. *Harman*, the defendant pleaded outstanding judgments; and *Brooking* v. *Jennings* is an authority to shew that an executor cannot avail himself of the fact of payment of a simple contract debt before notice of the existence of a debt of a higher order, without specially pleading it. Here, it appears, that, immediately on the death of Miss Wade, the defendant paid the specific legacy to Miss Chapple. Had Miss Chapple brought an action, she could not have availed herself either of the letter of Waldron or the fact of Miss Wade's taking possession of the furniture, as evidence of an assent to the bequest to her. It is clear, therefore, that the defendant has illegally parted with assets of Major Wade to the value stated in the case, and is liable to that extent.

TINDAL, C. J.—The defendant in this case sets up two objections to the plaintiffs' right to recover—first, that they

1837.

RICHARDS v. BROWNE.

have, by their own laches, as well as by the letter of Waldron, their attorney, misled the defendant in the administration of his testatrix's assets, and induced him to dispose of them in a way in which he would not otherwise have done—secondly, that Miss Wade was guilty of a devastavit in her life-time, and left no assets to be administered by the defendant, and consequently that he is not liable. As to the first point, I am ready to admit, that, if a creditor, by letter or otherwise, so far misleads an executor as to induce him to adopt a course in the administration of the assets that have come to his hands that he would not have taken but for such interposition on the part of the creditor, the latter cannot afterwards complain of that which has been done through his means. But it seems to me that the facts of this case do not bring it within that principle. Miss Wade, it appears, being her brother's executrix, paid interest on the note in question from the time of her brother's death down to the year 1831. Those payments must be referred to her legal liability as executrix. In July, 1831, a communication by letter, upon the subject of the note, took place between Waldron, the plaintiffs' attorney, and the defendant and his brother, who are stated in the case to have been the attornies of Miss Wade. The case does not set out the Messrs. Browne's letter, to which Waldron's letter is in reply: but we must endeavour to collect as well as we can from the reply what was the situation of the parties. It begins "*Richards* v. *Wade*;" from which I should infer that there had been some previous communication between them upon the subject of this note: it then goes on:—"As I am apprehensive you have in some measure misunderstood my clients' demand, I write you by return of post. My clients do not claim from Miss Wade payment of this money as executrix or administratrix of W. B. Wade, Esq.; but they claim from Miss Wade individually, Miss Wade having become liable, from payment of interest from time

First point.

1837.

RICHARDS v. BROWNE.

to time, to this debt"—giving for the supposed alteration of liability a reason that is perfectly untenable in law: there is no consideration for any such change of liability; no promise on Miss Wade's part to assent to it: it was a mere gratuitous mis-statement of the law by Waldron. Suppose, the day after that letter was written, the plaintiffs had thought proper to change their mind, and to bring an action on the note against Miss Wade as executrix; could she have set up this letter of Waldron's as an answer to the demand? Or, suppose, after the death of Miss Wade, the plaintiffs had sought to recover the amount from her personal representative as for a debt due from her individually, the action would clearly have been defeated by shewing that she was only liable as executrix of her brother. So that, according to the defendant's argument, the plaintiffs could have no right of action at all. Waldron's letter, however, could not deprive them of any right. And from that letter it is perfectly apparent that the defendant was aware that this was a debt for which Miss Wade was liable. The case, therefore, stands clear of all the precedents as to laches or want of notice. The defendant had actual notice; and consequently there is no ground for saying that he has been misled. There being furniture belonging to the estate of W. B. Wade to the value of 200*l.*, which the defendant has suffered to pass to the person entitled in remainder, he has not duly administered the assets of his testatrix left unadministered by her, and has failed in making out his plea.—With regard to the second point—that Miss Wade had in her life-time been guilty of a devastavit, and died insolvent—I am of opinion that there is no evidence of a devastavit by Miss Wade. It is true that the assent of an executor to the devise of a particular estate is in law an assent to the estate in remainder also: but the case is very different where the devisee for life is also executor. Where a party may take by a title that is good, and also by a bad title, the law always assumes that

Second point.

1837.

RICHARDS v. BROWNE.

he takes in assertion of the former. Why, then, should we hold that Miss Wade took as legatee by a wrongful title, when she might have taken as executrix rightfully? There was no assent by Miss Wade to the taking possession of the furniture by Miss Chapple: she took by the consent of the defendant. Upon both points, therefore, I think the plaintiffs are entitled to judgment.

PARK, J., merely expressed his concurrence.

VAUGHAN, J.—I am of opinion, upon the state of facts presented to us, and the law applicable thereto, that the plaintiffs are entitled to recover. The issue was, whether or not there were assets in the defendant's hands applicable to the payment of this debt. It stands admitted on the case that furniture to the value of 200*l.* came to Miss Wade's hands on the death of her brother, and, on her death, with the assent of the defendant, was taken possession of by Miss Chapple. The assets appear to have been very precipitately administered. It is admitted that the debt is due, and has never been paid: and there is no pretence for saying that the defendant has been misled.

Judgment for the plaintiffs.

The Master and Wardens of the SKINNERS' COMPANY *v.* JONES.

Wednesday, Jan. 25th.

DEBT on a bond bearing date the 1st March, 1832, subject to the following condition, which was set out in

The defendant, as surety for one J. B., on the 1st March, 1832, executed a bond conditioned for the payment by J. B. of one year's interest, viz. 5*l.*, on the 1st March, 1833, a like sum on the 1st March, 1834, and 205*l.*, principal and interest, on the 1st March, 1835. J. B. paid the first year's interest on the 30th March, 1833, and the second on the 5th April, 1834, but omitted to pay the 205*l.* due on the 1st March, 1835. The defendant, the surety, committed an act of bankruptcy on the 10th June, 1833, upon which a commission issued on the 20th, under which he on the 24th August obtained his certificate:—Held, in an action against the surety, that the bond, being forfeited before the defendant's bankruptcy, constituted a debt proveable under the commission, and consequently that his certificate was a bar to the action.

1837.

The Skinners' Company v. Jones.

the declaration:—"Whereas, by an order of the high court of Chancery, bearing date the 1st day of August, 1822, and made in the matter of Thomas Hunt's Charity, it was ordered that the scheme therein mentioned as approved of by the Master, should be carried into effect; by which scheme it was, among other things, proposed that the annual sum of 400*l.* should be immediately, and from time to time afterwards, lent out by the Skinners' Company to as many young men as were freemen of the said company, as the same would be sufficient for, until it should have accumulated to 4,000*l.*, in sums of 200*l.* each, for the space of three years, at interest after the rate of 2*l.* 10*s.* per cent., upon security to be approved of by the master and wardens of the said company for the repayment of such sum of 200*l.* with the said interest (payable yearly) at the end of the said three years; and that, in case any young man who should have had such loan advanced to him as aforesaid, should, during any part of the time which he was entitled to retain and hold the same, fall into any decay, by riot or ill husbandry, or any dishonest or immoral conduct, the said master and wardens should be at liberty to call in and enforce the repayment of the loan of each and every such young man, with all interest due thereon, and lend out the same again to others; and whereas James Butler applied to the master and wardens of the said company for the loan of the sum of 200*l.*, and satisfactorily shewed to the master and wardens that he was qualified to accept of such loan according to the said order and scheme, and proposed Francis Jones as his surety for the repayment of the said sum, with interest as aforesaid, and for the performance of the conditions of the said loan, pursuant to the requisitions of the said order and scheme; and the said master and wardens, being satisfied with such security and qualification, advanced and lent the sum of 200*l.* unto the said James Butler according to the trusts reposed in them; the condition of

1837.

The SKINNERS' Company v. JONES.

this bond is, that, if the said James Butler, his heirs, executors, or administrators, should well and truly pay or cause to be paid unto the said master and wardens, their successors or assigns, on the 1st day of March next ensuing the day of the date of the bond, the sum of 5*l.*, being the first year's interest on the said sum of 200*l.* at the rate of 2*l.* 10*s.* per cent. per annum, and on the 1st day of March, 1834, the like sum of 5*l.*, being the second year's interest as aforesaid, and on the 1st day of March, 1835, the sum of 205*l.* of like lawful money, being the said principal of 200*l.* and the third year's interest as aforesaid; or in case the said James Butler should, during any part of the said term of three years during which he was to retain and hold the said sum of 200*l.* as aforesaid, fall into decay, by riot or ill husbandry, or any dishonest or immoral conduct, then, if the said Francis Jones, his heirs, executors, or administrators, should well and truly pay or cause to be paid on demand unto the said master and wardens, their successors or assigns, the full sum of 200*l.*, with interest for the same, after the rate aforesaid, from the date of the above bond, or from the last day up to which the interest of the said sum of 200*l.* should have been paid, as the case should happen, the bond should be void, but otherwise should be and remain in full force and virtue." The declaration then proceeded to state, that, although the said James Butler duly paid the two several sums of 5*l.* each, being the first two years' interest, according to the condition in that behalf, to wit, on &c., and although the day in and by the said condition appointed for payment of the sum of 205*l.* elapsed long before the commencement of the suit, yet the said James Butler did not on the day and year last aforesaid, to wit, on the 1st March, 1835, pay the said sum of 205*l.* according to the tenor and effect of the said condition in that behalf, and the same was and still remained wholly due and unpaid to the plaintiffs.

1837.

The SKINNERS' Company v. JONES.

The defendant pleaded, that the said James Butler did not duly pay the interest which became due under and by virtue of the said writing obligatory, and the said condition thereof, on the 1st March, 1833, according to the form and effect of the condition of the said writing obligatory, as in the declaration alleged, but wholly neglected and omitted so to do, and therein failed and made default, whereby the said writing obligatory became forfeited; that, after the making of the said writing obligatory, and after the same so became forfeited, and before the commencement of this suit, to wit, on &c., the defendant became bankrupt within the true intent and meaning of the statute made and then in force concerning bankrupts; and that the said debt in the declaration mentioned, and thereby demanded, became due and was payable, and the cause of action for or in respect thereof accrued to the plaintiffs before the defendant so became a bankrupt as aforesaid—concluding to the country.

Plea.

Upon this plea, the plaintiffs joined issue; and, by consent of the parties, the facts were stated for the opinion of the court in the following case:—

Special case.

By bond of the 1st March, 1832, stated in the declaration, and executed as well by the said James Butler as by the defendant, they became jointly and severally bound to the plaintiffs in 400*l.*, subject to the condition stated in the pleadings. The sum of 200*l.* therein mentioned was advanced, as therein expressed, to James Butler, who paid the plaintiffs the first year's interest, viz. 5*l.*, on the 30th March, 1833, and the second year's interest, 5*l.*, on the 5th April, 1834; but had not paid the 205*l.* which was payable on the 1st March, 1835, according to the said condition, or any part thereof.

The defendant, being a trader, and indebted to divers persons, committed an act of bankruptcy on the 10th June, 1833; and a commission of bankrupt was duly awarded and issued against him on the 20th June, 1833,

1837.

The SKINNERS' Company v. JONES.

under which the said act of bankruptcy was proved, and he was thereupon duly declared a bankrupt; and on the 24th August, 1833, a certificate of his conformity was duly signed and allowed.

After the 1st March, 1835, several applications for payment of the 205*l.* were fruitlessly made to James Butler; but no application was made to the defendant, as his surety, for payment of that sum, until the 20th May, 1835; nor did the defendant receive any notice from the company that they should look to him for payment of either the principal or the interest, before the last-mentioned day.

The plaintiffs never proved or claimed, or attempted to prove, any debt whatever on the estate of the defendant under the commission issued against him.

The question for the opinion of the court was—whether the bankruptcy and certificate of the defendant barred the claim of the plaintiffs in the present action. If the court should be of opinion in the affirmative, then the plaintiffs agreed that a judgment should be entered against them of nolle prosequi immediately after the decision of this case, or otherwise, as the court might think fit; but, if the court should be of a different opinion, then the defendant agreed that judgment should be entered against him by confession for 400*l.* debt and 1*s.* damages, and costs to be taxed immediately after the decision of this case, or otherwise, as the court might think fit; and that judgment should be entered accordingly.

Question.

Henderson, for the plaintiffs.—The plaintiffs' claim is not barred by the 6 Geo. 4, c. 16, s. 121, it not being a debt due by the bankrupt at the time of his bankruptcy, nor a claim or demand by the statute made provable against the estate. By the condition of the bond the defendant as surety undertook, in case Butler, the principal obligor, should make default, to pay to the obligees, or their suc-

1. As to whether there was any debt susceptible of valuation at the date of the commission.

1837.

The SKINNERS' Company v. JONES.

cessors, on the 1st March, 1833, the sum of 5*l.*, for a year's interest on 200*l.*, 5*l.* on the 1st March, 1834, and 205*l.* for principal and interest on the 1st March, 1835; or, the entire principal and interest immediately, in case Butler should in the meantime fall into decay by riot or ill husbandry, or any dishonest or immoral conduct. By the 6 Geo. 4, c. 16, s. 56, it is provided, "that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends." This was not provable as a contingent debt: there was no debt existing at the date of the bankruptcy, and it was doubtful whether a debt would ever become due from the defendant; consequently there was no contingency susceptible of valuation. *Thompson* v. *Thompson*, 2 New Cases, 168, 2 Scott, 266, is in point: it was there held that the instalments of an annuity for the payment of which the bankrupt was surety only, and which he covenanted to pay in case of default by the grantor, accruing due after the bankruptcy, were not provable under a fiat against the surety. In *Ex parte Adney*, Cowp. 460, where A., in consideration of 1*l.* 10*s.* 7*d.* received of B., undertook in writing to make himself liable for the due payment of a note upon which H. was then indebted to B., and B. thereupon consented to furnish H. with more goods, and A., before the note was due, became bankrupt: it was held that A.'s

undertaking was intended as a collateral engagement only, in case H. should not pay the note when due; and that, consequently, as it rested on a contingency whether it would ever become a debt or not, it could not be proved as such under A.'s commission. So, in *Alsop* v. *Price*, Doug. 160, where a surety was sued, after his bankruptcy and certificate, on a bond conditioned like the present, it was held not to be a debt provable under the commission. In all the cases in which a bond has been held to be provable under a commission against a surety, the contingency has been susceptible of valuation; as in *Wyllie* v. *Wilkes*, Doug. 501. In *Winter* v. *Mousely*, 2 B. & A. 802, a bond conditioned for the payment of a sum to the executors of the obligee, and interest in the meantime to him on certain days, or within twenty days after demand, was held not to be provable under a commission against the obligor, though no interest had been paid, and there had been no demand, for the bond was not forfeited until neglect to pay after demand. Cases as to annuities are not applicable, for, they are evidently susceptible of tabular computation. Thus, in the case of *The Overseers of St. Martin* v. *Warren*, 1 B. & A. 491, 2 Stark. 188, the defendant's liability as surety in a bastardy bond was held not to be discharged by his bankruptcy and certificate. Lord Ellenborough there said: "This was a debt upon a contingency, and one too in its nature wholly incapable of valuation, and therefore, in my opinion, not provable under the commission. The case of an annuity is an exception to the general rule: there, indeed, the courts have allowed the amount of the contingent debt to be valued and assessed; but there you may estimate the duration of life." So, in *Clement* v. *Langley*, 5 B. & Ad. 372, 2 N. & M. 269, A., surety with B. for C., was held to be compellable to pay the debt after the bankruptcy of B.; the certificate of B. being no answer to the action of A. for contribution. Littledale, J.,

1837.

The Skinners' Company v. Jones.

there says: "It is true, that, in point of form, when the bond was once forfeited, an action was maintainable against all the obligors; but that did not, in my opinion, constitute a debt of the bankrupt within the statute. The decision in *Wood* v. *Dodgson*, 2 M. & S. 193, that solvent partners, who had been compelled after a dissolution to pay the debt of a bankrupt partner, for which they were jointly liable at law, might prove for it against his estate, went a great way; but the doctrine here contended for would go still further. Again, supposing the bond forfeited at the time of the bankruptcy, and that the parties had been sued upon it, and judgment obtained, and that the penalty stood as a security for further breaches, how could this liability be valued as a debt from the bankrupt to the co-sureties? An annuity for life or years may be valued at any time; but here, although the engagement was to pay at the end of five years, the principal and interest might be called in before." And Parke, J., said: "The plaintiff cannot be said to have been liable at the time of the commission for a debt of the bankrupt. The debt then subsisting was the principal's: the bankrupt was only a co-surety with the plaintiff and others. It is said the forfeiture before the bankruptcy created a debt to the obligee. But, on this bond, framed as it was, no debt arose that was capable of being ascertained, beyond the interest due in June, 1829, and that is, as between the obligees, the debt of Channell: as to the principal and future interest, there is no ascertainable debt existing. Notice might have been given at any time during the five years, to pay the principal and interest, and until such notice, or the expiration of the time, it was uncertain what the debt would be. No specific part could have been proved for under the defendant's estate. It was uncertain what would be due at any particular time, and also whether or not Channell, the debtor, would perform his duty by paying it." The first part of the 56th section provides for the case of

1837.

The SKINNERS' Company v. JONES.

a contingency that has not happened, the second for one that has happened. The present case clearly does not fall within the first part of the clause: it would be injustice to the creditors of the surety, and therefore never could have been contemplated by the legislature, that the obligees should be allowed to claim against the surety's estate before default by the principal debtor. This not being an original, but a contingent debt, and not being susceptible of valuation at the date of the commission, was not provable under the commission—*Atwood* v. *Partridge*, 12 Moore, 431, 4 Bing. 209; *Boorman* v. *Nash*, 9 B. & C. 145; *Yallop* v. *Ebers*, 1 B. & Ad. 698; *Ex parte Lancaster Canal Company*, 1 Mont. 44; *Ex parte Davis*, 1 Mont. 121; *Ex parte Tindal*, 8 Bing. 402, 1 Scott, 607, 1 Mont. 325, 462, 1 Mont. & Mac. 415, 1 Deac. & Ch. 291. In the last mentioned case, the proof had been rejected by the commissioners on the ground that the contingency was not susceptible of valuation; the Vice Chancellor afterwards held that the debt was provable (1 Mont. 415); the Vice Chancellor's decision was over-ruled, on appeal, by the Lord Chancellor: but, on appeal to the House of Lords (1 Mont. & Bligh, 235), the judgment of the Vice Chancellor was upheld, the contingency being decided to be capable of valuation; and it actually was valued by an actuary.

But it will probably be contended on the part of the defendant, that the bond in this case became forfeited before the bankruptcy of the defendant, by the default of Butler in payment of the first year's interest on the day on which it became due, and that, by reason of such forfeiture, the penalty became the debt in law, and provable under the commission. It may be conceded that the bond was in fact forfeited before the defendant's bankruptcy: still, the obligees, by receiving the first year's interest before the bankruptcy, waived the forfeiture. The only forfeiture in respect of which the plaintiffs could have

2. As to the effect of the forfeiture.

1837.

The SKINNERS' Company v. JONES.

proved, was, the default in payment of the 205*l.* on the 1st March, 1835, and that took place six months after the date of the defendant's certificate. In *Ex parte Simpson*, 1 Mont. & Ayr. 563, 3 Deac. & Ch. 792, the Chief Judge of the Court of Review observes: "My opinion has always been, where the contingency on which the payment of a debt depends happens before the declaration of a final dividend, and before the bankrupt has obtained his certificate, the creditor may, and is bound, under the latter branch of the 56th section, to come in and prove his debt under the commission, though at the date of the commission the debt was incapable of valuation." Sir John Cross, however, entertained a different opinion; and the case was decided upon another point, viz. that the debt was an original debt. *Ex parte Grundy*, 1 Mont. & Mac. 293 (upon the decision in which rests *Ex parte Lewis*, 1 Mont. & Mac. 426), will probably be relied on by the other side. Although this point was there taken, the judgment proceeded on the question whether the 56th section of the 6 Geo. 4, c. 16, was retrospective in its operation or not. In *Ex parte Holt*, 2 Mont. & Ayr. 562, one of two trustees misapplied the trust funds, and a commission issued against him, under which he obtained his certificate; no proof was made, as he concealed the fact, and continued to pay the interest; four years afterwards, a joint fiat issued against him and his then partners, under which he also obtained his certificate; after which the breach of trust was discovered: and it was held that the certificate under the commission was a bar to any proof under the fiat. The 109th section of the 6 Geo. 4, c. 16, directs that a final dividend shall be declared, in ordinary cases, within eighteen months after the date of the commission. Here, a considerably longer space of time intervened between the date of the commission and the period at which the supposed debt was capable of being ascertained.

1837.

The SKINNERS' Company v. JONES.

Fish, for the defendant.—The simple question is, whether or not there was a debt capable of valuation due from the defendant to the plaintiffs at the time of the bankruptcy: if there was, the defendant is clearly entitled to the judgment of the court; for, by the 121st section of the 6 Geo. 4, c. 16, a bankrupt who has duly conformed, and obtained his certificate, is discharged "from all debts due by him when he became bankrupt." Debts barable by the certificate, and debts provable under the commission, are convertible terms. The bond was forfeited by the obligor's default in payment of the first year's interest on the 1st March, 1833: it then became an absolute debt. The subsequent payment and receipt of the year's interest did not cure that forfeiture. Payment *after* the day mentioned in the condition is not equivalent to a payment *on* the day: if it were so, there would have been no necessity for the 4 & 5 Anne, c. 16, the 2nd section of which gives the plea of solvit post diem. That statute amounts to a legislative exposition of what was the common law upon the subject. The statute of Anne contemplates the case of a payment of principal and interest in one sum certain. *Murray* v. *The Earl of Stair*, 3 D. & R. 278, 2 B. & C. 82, *Van Saudau* v. ———, 1 B. & A. 214, and *Smith* v. *Bond*, 3 M. & Scott, 528, 10 Bing. 125, are authorities to shew that this bond is not within the statute of Anne, but one upon which it would have been necessary for the plaintiffs to assign breaches under the 8 & 9 Will. 3, c. 11, s. 8. Payment after the day was clearly no answer to the plaintiffs' claim upon the bond—*Ex parte Winchester*, 1 Atk. 118. In *Perkins* v. *Kempland*, 2 W. Blac. 1106, it was held that an annuity bond, if forfeited before the bankruptcy, should be valued and proved under the commission: otherwise, if not forfeited till after. "The bond," say the court, "being forfeited, became a debt at law. The equitable redemption of that forfeiture, by payment of the arrears of the growing annuity, was the pro-

Second point.

1837.

The Saunders' Company v. Jones.

per subject of valuation. And the debt so appreciated ought to have been proved under the commission."

First point.

The debt created by the bond was not contingent. Butler and the defendant jointly and severally bound themselves for the payment by the former of a year's interest on the 1st March, 1833. It was the defendant's duty to see that the interest was duly paid by Butler on that day. His failure so to do clearly operated a forfeiture of the bond. If, therefore, there were any contingency, such contingency has happened. In *Ex parte King*, 8 Ves. 334, the Lord Chancellor says: "It has often been determined in bankruptcy, that, if the condition is broken before the bankruptcy, you may prove; but there is no instance of admitting the proof where the condition was not previously broken. If the bond had been forfeited either as to the capital or the dividend, it would have done; as if, though the bankruptcy was previous to the time at which the stock was to be replaced, a forfeiture had been incurred by not paying the dividend; and the petitioner might in either case have proved." In *Ex parte Rowlatt*, 2 Rose, 416, a bond was conditioned to be void upon payment of 3,000*l.*, with interest from the death of the obligor, if the obligor should perform his covenant for the payment of an annuity specified in an indenture of settlement; the annuity being in arrear at the time of the bankruptcy of the obligor, was held to create a breach of the condition of the bond, to which the certificate would be a bar; and the obligor was allowed to prove under the commission. These cases occurred before the passing of the 6 Geo. 4, c. 16, since which period debts resting on contingency are provable where they are susceptible of valuation. In *Ex parte Tindal*, 1 M. & Scott, 607, 8 Bing. 492, W. S. by settlement made on his marriage, covenanted that his executors should, within twelve months after his decease, pay to his wife's trustees 4,000*l.*, with interest from the time of

1837.

The Skinners' Company v. Jones.

his death, in trust to pay the interest to the wife for her life in case she survived him, and, after her death, the principal to be divided between the children of the marriage; and, if they had no child or children, to the survivor of them, W. S. and his wife, his or her executors, &c. W. S. became bankrupt, the wife being still alive: and it was held that the covenant to pay the 4,000*l.* was a debt payable upon a contingency, within the meaning of the statute 6 Geo. 4, c. 16, s. 56; and that the valuation should be, the present worth of 4,000*l.* payable twelve months after the death of the bankrupt. In *Ex parte Thompson*, 1 Mont. & Bligh, 219, 2 Deac. & Ch. 126, where a surety covenanted to pay the annuity in case default should be made by the grantor, and the surety became bankrupt *before* default, the value of the annuity was held not to be provable against his estate. But there would have been no difficulty had the default been made before the bankruptcy of the surety. In *Ex parte Myers*, 1 Mont. & Bligh, 229, 2 Deac. & Ch. 251, Sir George Rose says: "I never before heard it doubted that the debt was provable after the contingency had happened." The debt therefore was clearly provable, and the certificate a bar.

Henderson was heard in reply.

TINDAL, C. J.—The question is whether the debt accruing under the bond executed by the defendant was or was not provable against his estate; for, if it were so, his certificate is a bar to the action. It appears to me, that, in determining this question, it will not be necessary to consider the construction that has been put upon the 56th section of the 6 Geo. 4, c. 16, by the decided cases; for, I am of opinion that the bond was forfeited at the time of the defendant's bankruptcy, and might then have been made the subject of proof against his estate. The bond

1837.

The Skinners' Company v. Jones.

bears date on the 1st March, 1832, and was executed by Butler and the defendant, who thereby became jointly and severally bound to the plaintiffs in the sum of 400*l.*, subject to a condition making void the bond if Butler, the principal, his heirs, &c., should pay or cause to be paid to the master and wardens of the Skinners' Company (the plaintiffs), their successors or assigns, on the 1st March, 1833, the sum of 5*l.*, being the first year's interest on 200*l.*, the sum advanced, at the rate of 2*l.* 10*s.* per cent. per annum, and, on the 1st March, 1834, the like sum of 5*l.*, being the second year's interest as aforesaid, and, on the 1st March, 1835, the sum of 205*l.*, being the principal sum of 200*l.*, and the third year's interest. The construction of the condition must be the same as if the parties had executed two separate bonds. It is stated as a fact in the case, that, on the 1st March, 1833, Butler, the principal, made default. No one can doubt, therefore, that, in a court of law, the bond would be held to have been forfeited, and the penalty to have become due, on that default. If things had remained in that state down to the date of the defendant's bankruptcy in June, 1834, there would have been no ground for argument. But it is contended on the part of the plaintiffs, that, the acceptance by them of the first year's interest from Butler on the 30th March, 1833, amounted to a waiver of the legal effect of the forfeiture. I am not aware of any principle of law upon which such a position can be supported. Had the bond been conditioned for the payment of both principal and interest on a given day, and both had been received by the obligees after the stipulated day of payment, then the statute 5 & 6 Anne, c. 16, which gives the plea of solvit post diem, would have placed the defendant in the same situation as if there had been no forfeiture: but the very circumstance of that statute giving the plea shews that at common law the subsequent payment did not operate as a waiver of the default. "Accord is no plea

where a certain duty accrues by the deed merely; for, a deed ought to be avoided by a matter of as high a nature— 6 Rep. 44. a." The statute of Anne does not apply to the case of a bond conditioned for other things besides the payment of a principal sum and interest on a given day, nor to a case where principal and interest are not paid together. I therefore think that we are bound to hold the bond forfeited by the event not having taken place which the condition contemplated, viz. payment of the first year's interest on the 1st March, 1833. I am not prepared to say whether or not a court of equity would have interfered to prevent the plaintiffs from proving the debt under the commission against the surety after having elected to treat the bond as an existing security. All that we are called upon to decide, is, as to the legal construction of the bond, which having become forfeited and absolute, the penalty was the debt in law, though the money actually advanced would be the amount provable; and that without reference to any contingency as between the borrower and lenders. The debt therefore being provable, the defendant's certificate clearly operates a bar to the present action.

PARK, J.—I was at first inclined to think that this was a contingent debt: but, upon further consideration, I am induced to agree with my Lord Chief Justice that it is not a case of that description. It is admitted that the bond was in fact forfeited on the 1st March, 1833, by the non-payment of the first year's interest due on that day. Had the plaintiffs then proceeded against the surety, he would clearly have been liable for the amount of the penalty. Once forfeited the bond became a debt at law susceptible of proof against the estate of the surety, and consequently barred by his certificate.

VAUGHAN, J.—I am of the same opinion. The apparent hardship of the case at first raised a doubt in my

1837.

The Skinners' Company v. Jones.

mind, which, however, I no longer entertain. The 121st section of the 6 Geo. 4, c. 16, provides "that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made provable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as thereinafter directed." The simple question, therefore, in the present case, is, whether this was a debt provable under the commission, or a contingency. The case is the same as if Butler and the defendant had executed several bonds. The condition being broken, and the bond forfeited, the forfeiture could not be purged by subsequent payment. The debt was clearly provable under the defendant's commission.

Judgment of nolle prosequi.

Wednesday, Jan. 25th.

Where a cause (which has been made a remanet) is tried before the sheriff on a day subsequent to the return day of the writ of trial, the court will amend the writ.

SHERMAN *v.* TINSLEY.

THIS was an action of assumpsit tried before Arabin, Serjeant, in the Sheriffs' court, London, on the 20th instant.

C. Jones, on the part of the defendant, moved to set aside the writ of trial, on the ground that it was returnable on the day preceding that on which the cause was tried; it having been made a remanet. [*Tindal*, C. J.—Did the defendant appear?] He appeared by counsel. [*Tindal*, C. J.—Then the objection is waived.] The defendant could not know at the time he appeared that the writ had expired.

PER CURIAM.—If necessary, we shall allow the writ to be amended by altering the return.

Jones took nothing.

1837.

Saturday, Jan. 28th.

VERE and Others *v.* GOWAR.

A writ of distringas, tested on the 26th March, last, and *returnable on the 15th April*, issued against the defendant at the suit of the plaintiffs. The notice subscribed thereto was as follows:—"Mr. Thomas Gowar,—Take notice that I have this day distrained on your goods and chattels in the sum of 40*s.*, in consequence of your not having appeared in court to answer to the said John Vere, Francis Sapte, and William Bunbury, according to the exigency of a writ of summons, bearing date on the 12th day of December, 1835; and, in default of your appearance to the present writ within eight days inclusive after the return hereof, the said John Vere, Francis Sapte, and William Bunbury, *will cause an appearance to be entered for you, and proceed thereon to judgment and execution.*" The writ of distringas was indorsed:—"The plaintiffs claim 54*l.* for debt, and 6*l.* for costs: and, if the amount thereof be paid to the plaintiffs or their attorney within four days from the service hereof, further proceedings will be stayed."

On the 18th April the sheriff returned to the distringas "non est inventus" and "nulla bona." On the 6th May, a writ of exigent, *tested the 18th April*, and returnable on the 9th June, issued against the defendant, who was thereupon proclaimed in the county court on the 8th June.

In October last, the defendant applied to a judge at chambers to set aside the proceedings to outlawry for irregularity, on the ground that no copy of the distringas had been left at the defendant's place of residence, and that he had no notice or knowledge of the proceedings. The learned judge to whom the application was made referred the parties to the court; whereupon, in the course of Michaelmas Term last—

R. V. Richards accordingly obtained a rule nisi.—The objections to the proceedings were—first, that no copy of

The notice at the foot of a distringas stating that, in default of the defendant's appearance, the plaintiffs *would cause an appearance to be entered for him*, and the plaintiffs afterwards proceeding to outlaw the defendant—The court set aside the proceedings with costs.

Quære whether the sheriff's return of non est inventus and nulla bona to a distringas issued with a view to proceeding to outlaw the defendant, dispenses with the necessity of leaving a copy of the writ at the defendant's place of abode, as required by the 3rd section of the 2 Will. 4, c. 39.

On proceeding to outlawry by summons and distringas—*Quære* whether the first writ of exigi facias should be tested on *the return day* of the distringas or on the day on which the sheriff actually returns it—*Semble*, the former.

1837.

VERE v. GOWAR.

the distringas had been delivered to, or left at the place of abode of the defendant, as required by the 2 Will. 4, c. 39, s. 3—secondly, that the writ of exigent should have been tested on the 15th April, the return day of the distringas, and not on the 18th, the day the writ was returned.

1. As to the want of service of a copy of the distringas.

Wilde, Serjeant, in the course of the same term, shewed cause.—1. The first question is, whether a distringas that is returned non est inventus and nulla bona can be said to be executed within the meaning of the statute. By the 3rd section of the 2 Will. 4, c. 39, it is enacted, "that, in case it shall be made appear, by affidavit, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the courts, that any defendant has not been personally served with any such writ of summons as thereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then and in any such case it shall be lawful for such court or judge to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form and with the notice subscribed thereto mentioned in the schedule to this act marked No. 3; which writ of distringas and notice, or a copy thereof, shall be served on such defendant if he can be met with, or, if not, shall be left *at the place where such distringas shall be executed;* and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days from the

teste thereof, and shall bear teste on the day of the issuing thereof, whether in term or in vacation; and, if such writ of distringas shall be returned non est inventus and nulla bona, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority thereinafter given, and any defendant against whom such writ of distringas issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear, by affidavit, to the satisfaction of the court out of which such writ of distringas issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of distringas, it shall be lawful for such court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution." The language of the notice referred to in that section is as follows:— "Take notice that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said court to answer the [plaintiff], according to the exigency of a writ of summons bearing teste on the —— day of ——; and that, in default of your appearance to the present writ within eight days inclusive after the return hereof, the [plaintiff] will cause an appearance to be entered for you, and proceed thereon to judgment and execution [*or, if the defendant be subject to outlawry,* will cause proceedings to be taken to outlaw you]." The statute requires a copy of the distringas to be served on the defendant or left at the place where the writ *shall be executed.* In the present case there has been no such execution of the writ as is contemplated by the act: the return of non est inventus and nulla bona is rather a certificate of the sheriff that the writ cannot be executed, than a return. The court will assume that the sheriff's return is true. He is a public officer whose acts are accredited by the courts

1837.

VERE v. GOWAR.

of the 12th section of the uniformity of process act, which directs that every writ issued by authority of that act shall bear date on the day on which the same shall be issued—*Lewis* v. *Davison*, 1 C. M. & R. 658, 5 Tyr. 198, 3 Dowl. 275.

Cur. adv. vult.

TINDAL, C. J., now said, that, upon looking at the documents which had been handed to the court, they found that the notice subscribed to the writ of distringas apprised the defendant, that, in default of his appearance to the writ within eight days inclusive after the return thereof, the plaintiffs would *cause an appearance to be entered for him*, and proceed thereon to judgment and execution; that, the form of notice given by the schedule, No. 3, being in the alternative—either to enter an appearance or to proceed to outlawry (see *Fraser* v. *Case*, 2 M. & Scott, 720, 9 Bing. 464)—the alternative which the plaintiffs had adopted did not warrant the proceeding to outlawry; and consequently that the writ of exigent and subsequent proceedings must be set aside.

Wilde, Serjeant, submitted, that, this objection not having been taken on the part of the defendant, either before the judge at chambers or before the court, the rule should be made absolute *without costs*.

R. V. Richards, contra, insisted that the fact of the plaintiff's proceedings being even more erroneous than the defendant had supposed them to be, afforded no ground for depriving the latter of his costs.

TINDAL, C. J.—The proceedings have clearly been irregular, and therefore I see no reason for departing from the usual course. I think the rule must be made absolute with costs, the defendant undertaking to appear.

The rest of the court concurring—

Rule absolute accordingly.

1837.

SOUTH *v.* FINCH.

Saturday, Jan. 28th.

By a memorandum of agreement, the plaintiff agreed to sell to the defendant "two flies at 60*l.*; harness and *goodwill* included:"—Held, that the memorandum could not be received in evidence without a stamp.

DEBT for goods sold and delivered, and for money alleged to be due on an account stated. The defendant pleaded that he was never indebted. At the trial before Gaselee, J., at the Sittings in London in Easter Term last, the plaintiff, in support of his case, put in the following agreement:—

"September 7, 1835.—Memorandum of an agreement between V. South and W. Finch. The said W. Finch agrees to take the two flies at 60*l.*; 5*l.* to be paid down, and the remainder of the money at three months from the above date. *Harness and goodwill included in the above agreement.*"

This agreement was not stamped. The plaintiff, it appeared, previously to the date of the memorandum, had carried on the business of letting flies for hire. There was no evidence to shew whether the goodwill of this business was of any value or not. It was objected, on the part of the defendant, that the memorandum could not be admitted without a stamp, it not being a mere agreement for or relating to the sale of goods, wares, and merchandizes, within the exemption in the stamp act, 55 Geo. 3, c. 184, sched. part 1, title "Agreement;" and therefore that the plaintiff must be nonsuited.

The learned judge, however, declined to nonsuit; but gave the defendant leave to move. A verdict having been taken for the plaintiff—damages 45*l.*—

Petersdorff, in Easter Term last, obtained a rule nisi accordingly.

Busby, on a former day in this term, shewed cause.—No stamp was necessary to make the agreement evidence. No doubt whatever could have arisen but for the intro-

1837.

SOUTH v. FINCH.

duction into the memorandum of the word "goodwill," for, without it, the whole agreement clearly relates to a sale of goods. Goodwill is a term not easily defined. In common parlance, it may mean, the custom attached to a house. But, as used here, it is impossible for the court to attach any legal meaning to it. Besides, there was no evidence at the trial to shew the value of the goodwill; and, unless of the value of 20*l.*, it would be free of duty. It is for the party objecting to shew that the contract is within the statute, the exemption not coming by way of exception, but as part of the original enactment—per Parke, J., in *Rex* v. *Enderby*, 2 B. & Ad. 205. The flies and harness were the principal subject matter of the contract; the goodwill seems to have been thrown in as a kind of bonus. The substantial part of the agreement relating to goods, the mere introduction of something collateral will not bring the whole within the act. In *Marson* v. *Short*, 2 New Cases, 118, 2 Scott, 243, A., having purchased a horse valued at 34*l.*, it was agreed between him and B. that the latter should have half at 17*l.*; and it was by the same memorandum agreed between the parties that the horse should "go to Newcastle, to be entered for the Handicap and silver cup;" and the court held that this was in substance an agreement for the sale of "goods, wares, and merchandizes," within the exemption in the stamp act, and consequently receivable in evidence without a stamp, notwithstanding the introduction of the collateral matter.

TINDAL, C. J.—The sum in dispute being small, I feel a difficulty in laying down a rule. But, suppose this had been an agreement for the sale of the plant *and goodwill* of a brewery or distillery, could it be said that the agreement related merely to a sale of goods? The argument on the part of the plaintiff must, as it seems to me, go that length. The plaintiff ought not, however, to have been

1837.

SOUTH v. FINCH.

nonsuited: he should have an opportunity to get the memorandum stamped. Probably the parties will agree that the verdict shall stand, without costs.

The case stood over; but the parties could not agree upon terms of compromise.

TINDAL, C. J., now said:—The inclination of the court is, that there should be a new trial, that the plaintiff may get the agreement stamped, and come better armed. The objection is a very harsh one. With respect to the costs, we leave them where the law has cast them.

Rule absolute.

MORRIS v. THOMPSON.

Saturday, Jan. 28th.

A rule to compute was refused in an action of covenant for non-payment of rent and land-tax. *Sed quære.*

COVENANT on an indenture of demise. The breaches assigned were non-payment of rent and land-tax.

Bult moved for a rule to compute.

PARK, J., the only judge in court, said he had never heard of a rule to compute in an action for breaches of covenant, and was unwilling to make a precedent for it; and consequently the rule was—

Refused (*a*).

(*a*) In Tidd's Practice, 9th edit. 571, it is said that the practice of granting rules to compute "is confined to cases where it appears on the declaration that the action is brought upon bills of exchange or promissory notes (Osborn v. Noad, 8 T. R. 648), or other actions wherein the quantum of damages depends upon figures, and may be as well ascertained by the master or prothonotaries as before a jury: and therefore, where the defendant suffered judgment by default in an action of assumpsit on a foreign judgment, the court of King's Bench refused to make the rule absolute for a reference to the master; saying, this was an attempt to carry the rule further than had yet been done, and, as there was no instance of the kind, they would not make a precedent for it (Messin v. Lord Massareene, 4 T. R. 493). In a subsequent case (Maunsell v. Lord Massareene, 5 T. R. 87), the court refused to make the rule absolute

1837.

Saturday, Jan. 28th.

In assumpsit against the *drawer* of a bill of exchange, the plaintiff must allege a promise to pay.

HENRY and Another *v.* BURBIDGE.

ASSUMPSIT on a bill of exchange, by indorsee against drawer. The first count of the declaration stated that George Henry and Edward Henry, by Nathaniel Lindo, their attorney, complained of George Burbidge, who had been summoned to answer the said George Henry and Edward Henry, by virtue of a writ issued on the 4th of November, 1836, out of the court of our lord the king before his justices at Westminster: For that whereas the defendant, on the 15th March, 1836, made his bill of exchange in writing, and directed the same to one James Pearson, and thereby required the said James Pearson to pay to the order of the defendant *29l.* 18*s.* 10*d.* four months after the date thereof, *which period has now elapsed*, and the defendant then indorsed the said bill to the plaintiffs; and the said James Pearson did not pay the said bill, although the same was presented to him on the day when it became due; whereof the defendant then had notice.

Special demurrer, assigning for causes—that it did not appear in or by the count that the bill therein mentioned became due or payable before the commencement of the suit, and that the words "which period has now elapsed,"

in an action upon a bill of exchange for *foreign* money, the value of which is uncertain, and can only be ascertained by a jury (Bagshaw v. Playn, Cro. Eliz. 536, Rands v. Peck, Cro. Jac. 617; 1 Chit. 621, 627): and in another case (Napier v. Schneider, 12 East, 420), they would not direct the master to allow re-exchange, in an action upon a bill of exchange drawn in Scotland upon and accepted by the defendant in England." But see Goldsmid v. Tate, 2 Bos. & Pull. 55.

In Holdipp v. Otway, 2 Saund. 106, cited by Buller, J., in 1 Doug. 316, a rule to compute was granted in an action on a covenant for the payment of a sum certain; in Berthen v. Street, 8 T. R. 326, in covenant on a mortgage deed; in Byrom v. Johnson, 8 T. R. 410, and Campion v. Crawshay, in covenant for non-payment of rent; and in Anonymous, 1 Wils. 75, in covenant *for non-payment of rent and not repairing.*

contained in the count, had reference to the date of the declaration, and not to the issuing of the writ for the commencement of the action (*a*); and that the count contained no promise by the defendant to pay the monies therein mentioned, or any part thereof, and was otherwise informal and insufficient, &c. Joinder.

Whitehurst, in support of the demurrer.—This declaration is clearly bad, for want of an allegation of a promise by the defendant. [*Tindal*, C. J.—In *Mountfort* v. *Horton*, 2 New Rep. 62, the declaration (in assumpsit) stating an agreement between two persons, omitted the mutual promises, and it was held, on motion in arrest of judgment, that this was immaterial, the agreement importing a promise.] The distinction between that case and *Starkey* v. *Cheesman*, 1 Salk. 128, 1 Str. 414, Carth. 509, 1 Lord Raym. 538, and the present, is, that in both the former the objection was taken on a motion in arrest of judgment; whereas here it is pointed out for cause of demurrer. The forms provided by the rules of Trinity Term, 1 Will. 4, contain an allegation that the defendant promised the plaintiff to pay the amount.

Martin, contra (*b*).—The forms given by the rules of Trinity Term, 1 Will. 4, were only introduced for the purpose of shortening the forms before in use, and diminishing costs: but, those forms not being prescribed by act of parliament, they need not be strictly followed. In *Wegersloffe* v. *Keene*, 1 Str. 214, it was held to be unnecessary in assumpsit against the acceptor of a bill of exchange to set out any promise. Fortescue, J., there says: "The

(*a*) This point was not argued, it being conceded that it was set at rest by the decisions of the court of King's Bench in Abbott v. Arlett, 4 Dowl. 759, and of the court of Exchequer in Owen v. Waters, M. T. 1836.

(*b*) The court proposed to *Martin* to amend his count: but he declined to do so, observing that the declaration contained counts for goods sold, and upon an account stated.

1837.

HENRY v. BURRIDGE.

plaintiff needed not set out any promise at all—*Lowther* v. *Conyers*, 1 Str. 224, which was upon a promissory note, and they left out nuper se assumpsit, and yet it was held well enough, for the law raises a promise." And in Bayley on Bills, 408, it is said: "This clause is unnecessary in an action against either the acceptor of a bill or the maker of a note; and it may be doubted whether it is essential in any other"—citing *Starkey* v. *Cheeseman*, where no promise is set out. These two cases are not fairly distinguishable from the present. Holt, C. J., in *Starkey* v. *Cheeseman*, says that the drawing of the bill is a promise: it is a promise that is supposed to arise after the dishonour of the bill by the acceptor. There can be no valid reason why a different rule should in this respect prevail in the case of an action against an acceptor and one against a drawer.

Whitehurst, in reply, was stopped by the court.

TINDAL, C. J.—There is this distinction between the case, of a drawer and that of an acceptor; in the former case, the defendant is only liable on the default of another. I am inclined to think, that, this being an action against the drawer, not in debt, as upon an original liability, but in assumpsit on the promise resulting from the law, to pay in case of default by the acceptor, the declaration should allege a promise. Mr. Justice Bayley merely says it may be doubted whether such allegation be essential. And, though it was held by Holt, C. J., in *Starkey* v. *Cheeseman*, that the drawing of the bill is a promise, yet it is to be observed that that was not a case of special demurrer, but the objection was taken in arrest of judgment. If the allegation of a promise may be dispensed with in such a case as the present, I do not see why it should not equally be dispensed with in counts for goods sold, money had and received, &c. I think the defendant is entitled to judgment.

1837.

HENRY v. BURRIDGE.

PARK, J.—I think the safer course is, to decide in the way pointed out by my Lord Chief Justice.

VAUGHAN, J.—I am of the same opinion. *Starkey* v. *Cheeseman* was the case of a motion to arrest the judgment: and there is nothing in that case to shew that the decision of the court would not have been otherwise had the objection been pointed out as a cause of special demurrer.

Judgment for the defendant.

The MAYOR of BATH *v.* PINCH.

Monday, Jan. 30th.

To warrant a motion for an attachment against a party for non-performance of an award, the order of Nisi Prius or the submission must appear to have been previously made a rule of court.

CASE by the Mayor &c. of Bath against the defendant, a brewer in that city, for unlawfully boring for water upon his own premises so as to divert the water from the wells belonging to the corporation. By an order of Nisi Prius the cause and all matters in difference between the parties were referred to arbitration. The arbitrator directed that certain works should be done by the plaintiffs on the defendant's premises: but the defendant refused to permit their work-people to enter for the purpose of carrying the award into effect.

Bompas, on a former day, obtained a rule nisi for an attachment against the defendant.

Crowder shewed cause.—The motion is premature. It does not appear that the order of Nisi Prius has been made a rule of court; and therefore the defendant cannot be in contempt.

Bompas, Serjeant, admitted that the order of Nisi Prius had not been made a rule of court: but he contended, that, as it appeared from the affidavits, and from the order of Nisi Prius, that all the acts to be done under the award were to be completed before the succeeding term, and consequently before the order *could* be made a rule of court,

1837.

Mayor of BATH v. PINCH.

and the rule of court when obtained having relation back to the date of the order, the parties must be taken to have dispensed with a strict and literal compliance with the practice of the court.

TINDAL, C. J.—I think the rule must be discharged. The argument urged on the part of the plaintiffs is not destitute of weight: but, how are we to say that the defendant, if served with the rule of court, might not have come to set it aside? A party clearly cannot be held to be in contempt until he has been made acquainted with the rule of court for the disobedience of which it is sought to put him in contempt.

PARK, J.—When called upon to issue against a party process of a criminal nature (*a*), we ought to see that the practice of the court has been strictly pursued.

VAUGHAN, J.—The ground of the motion for an attachment is, not the mere non-performance of the award, but the disobedience of a rule of court. In order to bring the defendant into contempt, personal service of the rule was essential (*b*).

Rule discharged, with costs.

(*a*) See Rex v. Myers, 1 T. R. 266; Rex v. Curwen, 1 Moore, 494.

(*b*) *Personal knowledge* of an award and rule of court makes the party liable to an attachment for non-performance of the award, although he has not been *personally served* with the award and rule. In re Bower, 1 B. & C. 264.

Monday, Jan. 30th.

LUCAS *v.* GOODWIN.

An affidavit to hold to bail stated that the defendant was indebted to the deponent in a certain sum "for materials found and provided, goods sold and delivered, and work and labour done and performed by the deponent to and for the use and benefit of the defendant, and at his request:"—Held, sufficient.

THE defendant was held to bail upon an affidavit which stated that he was indebted to the deponent in 240*l.* 10*s.*

1837.

LUCAS v. GOODWIN.

"for materials found and provided, goods sold and delivered, and work and labour done and performed by this deponent to and for the use and benefit of the defendant, and at his request."

Wilde, Serjeant, moved that he might be discharged out of custody, on entering a common appearance. He submitted that the above affidavit was insufficient, inasmuch as it did not unequivocally allege the materials to have been found and provided and the goods to have been sold and delivered "to and for the use and benefit of the defendant," these latter words, by grammatical construction, applying only to the limb of the sentence with which they were placed in juxta-position.

PER CURIAM.—By the natural construction of the language used, the words "to and for the use and benefit of the defendant, and at his request," must be taken to override the whole sentence.

Rule refused.

WILKINSON *v.* HALL and Another.

Monday, Jan. 30th.

THIS was an action of debt upon the statute 4 Geo. 2, c. 28, s. 1, brought by the plaintiff, who claimed as one of

The defendants entered under an agreement "that they should become tenants of the premises at 37*l.* a quarter, the tenancy to commence on the 14th June, they paying a quarter's rent on that day; and that they should give security to pay one quarter's rent in advance as long as they should continue tenants:"—Held, that, under this agreement, the defendants did not become tenants from year to year, but from quarter to quarter only; and therefore that proof of such an agreement did not support an allegation that the defendants held "as tenants for a term of years, from year to year, for so long" &c., or "for the residue of a certain tenancy for a term of years," &c.

The plaintiff mortgaged land in fee, with a proviso for redemption on payment of the principal and interest on the 5th June, 1834: but it was agreed that the mortgagee should not be entitled to call in the principal before the 5th December, 1840, provided the interest were regularly paid in the meantime; and it was further agreed that the mortgagor should peaceably and quietly have, hold, occupy, possess, and enjoy the premises, and receive and take the rents, issues, and profits thereof for his own use, until default made in payment of principal or interest, contrary to the aforesaid provisos or agreements for payment of the same:—Held, that, although, by the first part of the deed, the fee was vested in the mortgagee, the subsequent part operated as a re-demise of the premises to the mortgagor until the 5th December, 1840, provided the interest were regularly paid in the meantime.

1837.

WILKINSON v. HALL.

two tenants in common in fee of a wharf and warehouse, called Botolph Wharf, or Botolph Quay, in the city of London, against the defendants, as tenants of the same premises, to recover double the yearly value of one undivided moiety of the same premises, which it was alleged the defendants had wrongfully held over after the service upon them of notice to quit and demand of possession.

The declaration contained two counts upon the statute.

First count.

The first stated, that whereas the defendants, before and at the time of the giving of the notice to quit and making the demand as thereinafter mentioned, and from thence until a certain day, to wit the 14th June, 1834, held and enjoyed one undivided moiety or half part, the whole into two equal parts to be divided, of and in certain tenements, to wit, a certain quay or wharf, and certain warehouses, vaults, and buildings, with the appurtenances, as tenants

Defendants tenants for a term of years.

thereof to the plaintiff, that is to say, as tenants thereof for a term of years, from year to year, for so long a time as the plaintiff and the defendants should respectively please; and the defendants, during all the time aforesaid, held and enjoyed the other undivided moiety of the said tenements with the appurtenances as tenants thereof to one William Stennett, for a term of years, from year to year, that is to say, for so long a time as the said William Stennett and the defendants should respectively please, the reversion of and in the said first-mentioned one undivided moiety of the said premises with the appurtenances during all that time belonging to the said plaintiff, and the reversion of and in the other undivided moiety thereof during all that time belonging to the said William Stennett; and thereupon, theretofore, and whilst the defendants so held and enjoyed the said first-mentioned one undivided moiety of the said tenements with the appurtenances as tenants thereof to the plaintiff, and the said other undivided moiety thereof as tenants thereof to the said William Stennett as aforesaid, and whilst the said reversion of and

1837.

WILKINSON v. HALL.

in the said first-mentioned one undivided moiety thereof so belonged to the plaintiff, and whilst the said reversion of and in the said other undivided moiety thereof so belonged to the said William Stennett as aforesaid, to wit, on the 11th December, 1833, the plaintiff and the said William Stennett, and each of them, gave notice in writing to the defendants, and thereby demanded of and required the defendants to quit and deliver up the possession of the said tenements with the appurtenances to them the plaintiff and the said William Stennett, or to either of them, that is to say, possession of the said first-mentioned undivided moiety to the plaintiff or the said William Stennett, and the possession of the said other undivided moiety to the said William Stennett or to the plaintiff, on the said 14th June, 1834, provided the said defendants' tenancy of the said premises originally commenced at that period of the year; or otherwise, to quit and deliver up the possession of the said premises, that is to say, of the said first-mentioned undivided moiety thereof to the plaintiff or the said William Stennett, and the possession of the said other undivided moiety thereof to the said William Stennett or the plaintiff, at the end of the current year of their tenancies which should expire next after the end of half a year from the time of their being served with the said notice: and the plaintiff averred that the said term and tenancy of said first-mentioned undivided moiety of the said tenements with the appurtenances the reversion of and in which so belonged to him the plaintiff as aforesaid, and the said term and tenancy of and in the said other undivided moiety of the said tenements with the appurtenances the reversion of and in which so belonged to the said William Stennett as aforesaid, afterwards, to wit, on the 14th June, 1834, ended and were and each of them was duly determined by the said notice; and that, after the determination of the said tenancy of the defendants of and in the said first-mentioned undivided moiety of the said

1837.

WILKINSON v. HALL.

tenements with the appurtenances the reversion of and in which so belonged to the said plaintiff as aforesaid, and after the determination of the tenancy of the said defendants of and in the undivided moiety of the said tenements with the appurtenances the reversion of and in which so belonged to the said William Stennett as aforesaid, and whilst the defendants continued in possession of the entirety of the said tenements with the appurtenances as aforesaid, and the plaintiff was so entitled to the possession of the said first-mentioned undivided moiety thereof, and whilst the said William Stennett was so entitled to the possession of the said other undivided moiety thereof as aforesaid, to wit, on the said 14th June, 1834, the said plaintiff and the said William Stennett, by a certain notice in writing then made and signed by him the plaintiff and the said William Stennett, and delivered to the defendants, demanded and required the defendants to deliver the possession of the said tenements with the appurtenances to the plaintiff and the said William Stennett, that is to say, the plaintiff thereby demanded and required the defendants to quit and deliver up the possession of the first-mentioned undivided moiety of the said tenements with the appurtenances to him the plaintiff or the said William Stennett; and the said William Stennett thereby required the defendants to quit and deliver up the possession of the said other undivided moiety of the said tenements with the appurtenances to him the said William Stennett or the plaintiff; nevertheless, the defendants, not regarding the statute in such case made and provided, did not nor would, on the determination of the said term and tenancy of and in the said first-mentioned undivided moiety of the said tenements with the appurtenances as aforesaid, deliver the possession of the said first-mentioned undivided moiety of the said tenements with the appurtenances, or any part of such moiety, to the plaintiff or to the said William Stennett, or any other person or persons for or on behalf of

1837.

WILKINSON v. HALL.

him the plaintiff, according to the said notice so given, and the said demand so made as aforesaid, but wholly neglected and refused so to do; but, on the contrary thereof, the defendants wilfully held over the said first-mentioned undivided moiety of the said tenements with the appurtenances after the determination of the said term and tenancy of the said defendants in the said first-mentioned undivided moiety of and in the said tenements with the appurtenances, and after the said notice so given as aforesaid, and the said demand so made as aforesaid, for a long space of time, to wit, from thence hitherto; during all which time the defendants so kept the plaintiff out of the possession of the said first-mentioned undivided moiety of the said tenements with the appurtenances, and every part thereof, the plaintiff, during all that time, being entitled to the possession of the said first-mentioned undivided moiety thereof, contrary to the form of the statute in such case made and provided. It was then averred that the said first-mentioned undivided moiety of the said tenements, with the appurtenances, during the said time of holding over the same and keeping the plaintiff out of the possession thereof as aforesaid, was of great yearly value, to wit, of the yearly value of 1000*l.*; and by reason of the premises, and by force of the statute in such case made and provided, the defendants became liable to pay to the plaintiff a large sum of money, to wit, the sum of 1621*l.* 18*s.* 4*d.*, being at the rate of double the yearly value of the said first-mentioned undivided moiety of the said tenements with the appurtenances, for so long time as the same was so detained as aforesaid; and thereby, and by force of the statute, an action had accrued to the plaintiff to demand and have of and from the defendants the said sum of 1621*l.* 18*s.* 4d., parcel of the sum demanded.

Second count.—Defendants tenants for the residue of a term of years.

The second count stated that the defendants, on the 3rd December, 1833, and from thence until a certain day, to wit, the 14th December in the same year, held and enjoyed

1837.

WILKINSON v. HALL.

one undivided moiety of the said tenements, with the appurtenances, as tenants thereof to the plaintiff, for the residue and remainder of a certain tenancy for a term of years to them the defendants theretofore, to wit, on the 12th June, 1832, granted, the reversion of the one undivided moiety in that count mentioned of the said tenements with the appurtenances during all that time belonging to the plaintiff; and claimed the double value to the commencement of the action, upon a determination of the tenancy on the 14th December, 1833, and a demand of possession on the 16th.

Third count. The declaration also contained a count for use and occupation, in the usual form, claiming the single rent for six months from the before-mentioned 13th December, 1833, to the 13th June, 1834.

Pleas, to the first count; The defendants pleaded to the first count—first, that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the term or time in that count mentioned—secondly, that the reversion of and in the said moiety of the premises did not belong to the plaintiff, as in that count alleged—thirdly, that the plaintiff did not give such notice in writing to the defendants, or thereby demand of and require the defendants to quit and deliver up the possession of the said moiety of the premises as in that count alleged—fourthly, that the supposed term and tenancy of and in the said moiety of the premises was not ended or determined, as in that count

to the second count; alleged. To the second count—first, that they did not hold the said moiety of the premises as tenants thereof to lhe plaintiff for the residue and remainder of the supposed tenancy and term of years in that count mentioned—secondly, that the reversion of and in the said moiety of the premises did not belong to the plaintiff as in that count alleged—thirdly, that the supposed tenancy and term of years of and in the said moiety of the premises was not

to the third count. ended or determined as in that count alleged. And, to

1837.

WILKINSON v. HALL.

the third count—that they never were indebted to the plaintiff, as in that count alleged. Upon each of these pleas, issue was joined.

At the trial before Tindal, C. J., at the adjourned sittings in London after Trinity Term, 1835, the jury found the single yearly value of the entire premises to be 1841*l.*, which finding as to the value was to be binding on the parties: in other respects, the jury, by leave of the learned judge, and with the consent of the defendants, found a verdict pro formâ for the plaintiff, subject to the opinion of the court on the following case:—

Trial and verdict.

On the 12th June, 1832, the premises in question, consisting of a wharf or quay, warehouses, and buildings, called Botolph Wharf, or Botolph Quay, and situate between London Bridge and the Tower of London, then belonging to his Majesty, and being then vested in the lords commissioners of his majesty's treasury in trust for his majesty, or in the secretary for the time being to the said commissioners for the use and service of his majesty's Customs, the defendants entered into the following agreement:—

Premises vested in the lords of the treasury or in the secretary to the commissioners of customs.

That they should become tenants of Botolph Wharf at 375*l.* a quarter, the tenancy to commence on Thursday, the 14th June, they paying a quarter's rent on that day; that they should give security, to be approved of by the commissioners of Customs, to pay one quarter's rent in advance as long as they should continue tenants; that they should also give security to account for and pay over to the commissioners of Customs, for the benefit of the assignees, such sums as they might receive for rent for goods prior to the 14th of June, immediately upon being required so to do.

Agreement under which the defendants took the premises.

The above agreement was signed by W. J. Hall, as agent for and on behalf of the defendants, and by J. G. Walford, as solicitor for the commissioners of Customs,

1837.

WILKINSON v. HALL.

and agent for and on behalf of their secretary for the time being.

On the 13th June, 1832, the defendants, with one Lawrence Thompson as their surety, entered into a bond for 700*l.*, subject to the following conditions:—

Bond entered into by the defendants.

"Whereas the above-bounden W. Hall and T. S. Hall have this day become tenants to Charles Andrew Scovell, Esq., secretary to the commissioners of Customs, in trust for his majesty, of certain premises situate in Thames-street, called and known by the name of Botolph Wharf, at the rent of 375*l.* a quarter; and whereas the said W. Hall and T. S. Hall have this day paid to the said C. A. Scovell, in trust for his majesty, the sum of 375*l.* for the first quarter's rent, and have agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they hold the said premises; and whereas also there are certain sums due and payable for warehouse rent from certain parties in respect of goods bonded and warehoused at the said premises: now the condition of this obligation is such, that, if the said W. Hall and T. S. Hall shall well and truly pay to the said C. A. Scovell or his successors the said sum of 375*l.* on or before the first day of every quarter during which they hold the said premises, and shall at all times well and truly account to the said C. A. Scovell, or to such person as he shall appoint for that purpose, for all sums received by them or any of them, due and payable on account of warehouse rent as aforesaid, and shall permit and suffer the said C. A. Scovell, or any person appointed by him, to inspect all books, papers, and writings in their or any of their custody relating to such last-mentioned sums; then this obligation to be void; otherwise, to remain in full force and virtue."

Conveyance of the 2nd and 3rd Dec. 1833, from the lords of the treasury to the

By indentures of lease and release bearing date the 2nd and 3rd December, 1833, the premises called Botolph Wharf were conveyed by the lords of the treasury

1837.

WILKINSON v. HALL.

and the commissioners and secretary of the Customs, to the plaintiff and to his partner William Stennett, their heirs and assigns, to the uses therein declared, viz., as to one moiety, to such uses and upon such trusts as the plaintiff should by deed or deeds direct, limit, or appoint, and, in default thereof, or if incomplete, to the use of the plaintiff and his assigns for life, remainder to one J. K. Kinsman, his executors, administrators, and assigns, during the life of the plaintiff, in trust for the plaintiff; remainder to the use of the plaintiff, his heirs and assigns, for ever. Similar uses were limited and declared as to the other moiety in favour of W. Stennett.

plaintiff and Stennett.

By certain indentures of lease, appointment, and release, bearing date respectively the 4th and 5th December, 1833, the plaintiff and W. Stennett did, in consideration of 13,000*l.*, direct, limit, and appoint, that, from and immediately after the execution thereof, the undivided moiety of each of them in the above mentioned messuages and premises should remain and be to the use of Wynn Ellis, Esq., his heirs and assigns, for ever (subject to a proviso for redemption thereinafter contained, on payment of the sum of 13,000*l.*, with interest, on the 5th June then next). It was by the same indenture further provided, declared, and agreed, that the said W. Ellis should not be entitled to call in the principal money by him advanced upon the said mortgage before the 5th December, 1840, if the interest payable by the mortgagors in respect of such principal money was in the meantime regularly paid according to the terms of the said deed.

Mortgage of the 4th and 5th Dec. 1833, to Wynn Ellis.

Proviso for redemption.

Covenant by mortgagee not to call in the principal until the 5th Dec. 1840, mortgagors in the meantime duly paying interest.

In the said deed were also the following clauses or provisions:—"That, if the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, should not be paid conformably to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of that indenture, then and in such case it should and might be lawful for the said W. Ellis, his heirs and

Power to mortgagee to enter in case of default.

1837.

WILKINSON v. HALL.

assigns, at any time or times thereafter, into or upon the said wharf, quay, and hereditaments thereby appointed and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, without any let, suit, trouble, denial, interruption, or disturbance whatsoever of or from or by the said T. Wilkinson and W. Stennett respectively, or their respective heirs or assigns, or any person or persons whomsoever having or lawfully or equitably claiming, or who should or might have or lawfully or equitably claim, any estate, right, title, interest, or inheritance in, to, or out of the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, or any part or parts thereof: and that free and clear, &c.: Provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said T. Wilkinson and W. Stennett respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption, or disturbance whatsoever of or from or by the said W. Ellis, his heirs or assigns, or of or from or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for, him or them."

Proviso that mortgagors should peaceably and quietly have, hold, occupy, possess, and enjoy the premises, and receive and take the rents &c., until default.

On the 7th December, 1833, the following notice from

1837.

WILKINSON v. HALL.

the lords of the treasury and the secretary of the Customs, and signed by them respectively, was served upon the defendants:—

Notice to the defendants of the conveyance to the plaintiff and Stennett.

"Gentlemen—We hereby give you notice that we have sold and conveyed all that legal quay or wharf called or known by the name of Botolph Wharf, with the several warehouses, vaults, cranes, buildings, and appurtenances thereto belonging, situate &c., now in your occupation at the rent of 375*l.* per quarter, to Thomas Wilkinson and William Stennett; and we hereby direct you in future to pay your rent to those gentlemen, and to consider them in every respect as your landlords."

Prior to the conveyance, mortgage, and notice above stated, and while the negotiation for such conveyance was proceeding, namely, on the 12th September, 1833, the following notice was served upon the defendants:—

Notice to quit (12th Sept. 1833) by the assistant secretary of the Customs.

"Take notice that you are hereby required to quit on the 15th day of December next ensuing the date hereof, or other day on which the next quarter of your tenancy may expire, be the same the 12th, 13th, or 14th of next December, or any other day, the peaceable possession of all that legal quay or wharf called or known by the name of Botolph Wharf, with the warehouses, vaults, buildings, and appurtenances thereto belonging, situate &c., and now in your tenancy or occupation.

"John Ker, Secretary to the commissioners of his majesty's Customs, on their behalf and by their authority, and with the consent of the persons to whom the wharf is agreed to be sold."

The said John Ker was the assistant secretary to the commissioners of Customs, and acted at the board for and on behalf of the secretary during his absence.

Order of the board, authorizing the above notice.

On the 12th September, 1833, an order to the following effect was signed with the initials of Edward Stewart, who was acting chairman of the board of Customs at that time: —"The solicitor having laid before the board the form of a notice to be given pursuant to the treasury order of the

1837.

WILKINSON v. HALL.

authority, and with the consent of the persons to whom the said wharf was agreed to be sold. And you are hereby further required to take notice that we do hereby expressly declare that this present notice shall not operate or be taken or considered, and that the same is not meant, as a waiver or abandonment of the said notice so signed by the said John Ker and served upon you as aforesaid, in case that notice is legally sufficient to end and determine your tenancy of and in the aforesaid premises on any of the days therein specified. And we the undersigned W. Ellis, T. Wilkinson, and W. Stennett do hereby reserve to ourselves, and any or either of us, full power of adopting and acting upon the said notice so already served upon you as aforesaid, and of holding you liable for the double value of the said premises in case you shall hold over the same, or any part thereof, after any of the days mentioned in the notice so served upon you as aforesaid, provided your tenancy shall be thereby determined."

The defendants did not quit or deliver up possession of the premises, or any part thereof, at the expiration of either of the notices to quit above set forth; and on the 1st November, 1834, an action of ejectment was commenced in the name of John Doe on the three several demises of the plaintiff, W. Stennett, and W. Ellis, for the purpose of recovering possession of the premises. That action was tried on the 23rd December, 1834, when the defendants, by their counsel, consented that a verdict should pass for the plaintiff in that action, subject to a judge's order that execution thereon should be stayed for five weeks from that day. A verdict was taken for the plaintiff, and execution stayed, accordingly; and judgment in the said action of ejectment was not signed until the 18th February, 1835. Possession of the premises was obtained on the 6th April following, under and by virtue of a writ of possession issued on the judgment. In the interval between the judgment and obtaining possession, applica-

Action of ejectment brought.

Possession delivered on the 6th April, 1835.

tion was made to the defendants to give up the possession; but, the premises being used for the purpose of bonding goods, and there then being upon the premises many bonded goods, upon which duties were due and payable to the crown, which goods could not legally be removed until the duties had been paid, and the goods in question belonging to many different individuals, the defendants did not give up immediate possession of the premises. They, however, tendered possession thereof with the before-mentioned goods thereon; which tender was objected to, and possession refused, on the ground that the same was not such a possession as the plaintiff in ejectment, under his writ of possession, was entitled to.

The defendants had never paid any rent in respect of the said premises, either to the plaintiff or to his partner, W. Stennett.

The defendants objected that the plaintiff was not entitled to a verdict in the present action on any of the counts in the declaration.

The objections to a verdict on either of the counts for double value were—

Defendants' objections to the verdict:—

First—That there was no proof of any such tenancy as was stated in the first or second counts of the declaration, which tenancy the defendants having put in issue by their pleas, the plaintiff was bound to establish.

1. No proof of tenancy as stated in the first or second count.

Secondly—That there was no evidence to prove, but, on the contrary, that the evidence, and particularly the deeds of the 2nd and 3rd December, 1833, and of the 4th and 5th December, 1833, disproved that the plaintiff was seised of the reversion at the times and in manner and form as in the first and second counts alleged; which allegation the defendants having traversed, the plaintiff was bound to sustain.

2. Plaintiff not seised of the reversion.

Thirdly—That the tenancy created by the agreement of the 12th June, 1832, was not a tenancy for any term of life, lives, or years, within the meaning of 4 Geo. 2, c. 28,

3. Tenancy under the agreement of 12th June, 1832, not a tenancy

1837.

WILKINSON v. HALL.

s. 1, so as to subject the defendants to an action for double value, if in other respects the requisites of that statute had been complied with.

"for term of years" within 4 Geo. 2, c. 28, s. 1.

4. No sufficient notice to quit to put an end to the tenancy.

Fourthly—That the tenancy created by the agreement of the 12th June, 1832, was not so put an end to as to entitle the plaintiff to sue for double value, either by the notice to quit of the 12th September, or by that of the 12th December, 1833; because, as respects the notice of the 12th September, there was no proof of any sufficient authority given to the party who signed the same; and the notice, if given by the authority of the persons then entitled to the reversion, would not entitle a party to whom the reversion was conveyed after the giving the notice, and whilst it was running, to take advantage thereof in order to sue for double value. And, with respect to both notices, that, if either of them determined the tenancy, still the reversion at the time the tenancy was so determined was not in the plaintiff, but in W. Ellis, who, if any one, ought to have sued.

5. Time to which double value to be assessed.

The defendants further objected, that, if liable to double value at all, they were not liable for any time after the day of the demise mentioned in the declaration of ejectment.

6. As to the count for use and occupation.

As to the count for use and occupation, the defendants objected, that the plaintiff could not recover, inasmuch as before the 15th December, 1833, the reversion of the premises had been conveyed to Wynn Ellis, and the defendants were liable to him, and not to the plaintiff.

The questions for the opinion of the court were—

Questions for the opinion of the court.

Whether the four objections of the defendants to the claim for double value, and the objection to the claim for use and occupation, above particularly stated, or any of them, were well founded. If the court should be of opinion, that, notwithstanding the objections above stated, the plaintiff was entitled to a verdict on either or both of the counts for double value, then a verdict was to be entered on either or both counts accordingly, for a sum calculated

1837.

WILKINSON v. HALL.

at the rate of 335*l.* 11*s.* 3*d.* per quarter (the single value), from such a period, and for such a time, as, in the opinion of the court, the plaintiff was entitled to.

If the court should be of opinion that the plaintiff was entitled to recover for use and occupation, then a verdict was to be entered on the last count, for such a sum as the court should direct. If the plaintiff was not entitled to a verdict on any of the counts in the declaration, a nonsuit was to be entered. If entitled to a verdict on one or more, but not on the whole of the counts, then a verdict was to be entered for the defendants on the others or other as the case might be.

Argument for the plaintiff.

Sir *F. Pollock*, for the plaintiff.—The questions upon which it is proposed to take the opinion of the court, are four—first, whether the agreement of the 12th June, 1832, created such a tenancy as to render the defendants liable, under the 4 Geo. 2, c. 28, s. 1 (*a*), to an action for double value, for holding over after the expiration of a notice to quit—secondly, whether the notice to quit, of the 12th September, 1833, or of the 11th December following, or either of them, was sufficient to put an end to the tenancy

(*a*) Which enacts, "That, if any *tenant for life or years*, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or in collusion with such tenant, shall wilfully hold over any lands &c. after the determination of such term, and after demand made and notice in writing given for delivering the possession thereof, by the landlord or lessor, or person to whom the remainder or reversion of such lands, &c., shall belong, his or their agent thereunto lawfully authorized, then such person so holding over shall, for and during the time he shall so hold over or keep the party entitled out of possession, pay to the person so kept out of possession, his executors, administrators, or assigns, at the rate of double the yearly value of the lands, &c., so detained, for so long time as the same are detained, to be recovered in any court of record by action of debt, whereunto the defendant shall be obliged to give special bail, and against the recovery of which said penalty there shall be no relief in equity."

1837.

WILKINSON v. HALL.

under the agreement of the 12th June, 1832, so as to entitle the plaintiff to maintain this action—thirdly, whether the plaintiff was a reversioner within the meaning of the statute—fourthly, whether, the plaintiff being entitled to sue for double value, the defendants would be liable for any time after the day of the demise laid in the declaration of ejectment.

1. That such a tenancy was created by the agreement of June 12, 1832, as to render the defendants liable to an action for double value.

1. The defendants were either tenants from year to year at a rent payable quarterly, or tenants from quarter to quarter. The fact of the rent being reserved quarterly does not prevent the tenancy from being a yearly tenancy. Either, however, will suffice to bring the case within the statute. In *Legg* v. *Strudwick*, 2 Salk. 414, it was held that a parol demise to hold from year to year is a lease for two years. No case is to be found in the books that decides the precise question whether a general demise at a quarterly rent is a demise from year to year or from quarter to quarter. It must, however, be the one or the other; and either will subject the tenant holding over to an action for double value. In *Timmins* v. *Rawlinson*, 3 Burr. 1603, a tenant from year to year under a parol demise was held liable to double rent under the statute, for not delivering up possession after notice. Littleton, s. 67, says: "If tenements be let to a man for terme of halfe a yeare, &c., in this case, if lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum.*" Sir E. Coke, commenting upon this passage, says, Co. Litt. 54, b.—"In this particular case, the statute of Gloucester, c. 5, which giveth the action of waste against the lessee for life or years (which lay not against them at the common law), speaketh of one that holdeth for term of years, in the plural number; and yet here it appeareth, by the authority of Littleton, that, although it be a penal law, whereby treble damages and the place wasted shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the

same remedy, though it be out of the letter of the law; for, qui hæret in littera, hæret in cortice; which is an excellent example, whereupon in many like cases a man may settle a certain judgment." Every man whose estate is created with reference to an annual computation of time, is to be considered a tenant for years within the meaning of the statute, whether his tenancy be for one or more years or but for part of a year; for, the legislature must be presumed to have used the term "tenant for years," with reference to the construction put upon it by Littleton and by Coke. In *Lloyd* v. *Rosbee*, 2 Camp. 453, where it was ruled that debt for double value does not lie against a weekly tenant, Lord Ellenborough observed: "I am aware that a tenant for half a year, or a smaller portion of a year, may for some purposes be considered and be denominated a tenant for years; but this is a penal statute, and is to be construed strictly. I cannot, therefore, include a tenant from week to week in the description of tenants for life, lives, or years; and I do not remember any instance of a tenant for less time than a year being held within this statute." But, in *Wilkinson* v. *Colley*, 5 Burr. 2964, the statute was held to be remedial.

2. As to the sufficiency of the notices to quit.

2. The notice to quit dated the 12th September, 1833, given by Ker, the assistant secretary to the commissioners of the Customs, by their order, and under their authority, was a sufficient notice to determine the tenancy of the defendants—3 & 4 Will. 4, c. 51, s. 7. At all events, the second notice, dated the 11th December following, given by the plaintiff and Stennett and Wynn Ellis (whose accession to it, however unnecessary, could not have the effect of invalidating it), was clearly sufficient.

3. That the plaintiff was a reversioner within the 4 Geo. 2, c. 28, s. 1.

3. By the 1st section of the 2 & 3 Will. 4, c. 66, reciting, that, 'under and by virtue of several acts passed in the 39 & 40, 43, 46, 47, 50, 52, and 54 Geo. 3, the then lord high treasurer, or lords commissioners of his majesty's treasury were impowered to purchase the legal quays, warehouses,

1837.

WILKINSON v. HALL.

buildings, and other hereditaments therein mentioned, situate between London Bridge and the Tower of London; and that, under and by virtue of the said acts, or some or one of them, the legal quays, and certain warehouses, buildings, and other hereditments, situate as aforesaid, were purchased by the then lords commissioners of his majesty's treasury, and the values of the said legal quays, &c., paid to the persons entitled thereto respectively, in the manner directed by the said acts, or some or one of them; and the said legal quays, &c., so purchased as aforesaid, were duly conveyed to the said lords commissioners of his majesty's treasury, subject to the several rent-charges, leases, and agreements for leases then subsisting; and that, in consequence of the destruction of the Custom House by fire in February, 1814, several of the title deeds and copies of deeds of and relating to the said quays, &c., deposited at the said Custom House, were burnt or otherwise destroyed, and in consequence thereof difficulties might arise in making a good title to the said legal quays, &c., or some or one of them;' it is enacted, "that, from and after the passing of that act, if any person or persons shall contract and agree, or if any person or persons shall have contracted and agreed, for the purchase, sale, or disposal of any of the said quays, &c., or any part thereof, it should and might be lawful to and for the lord high treasurer or lords commissioners of his majesty's treasury for the time being, who for the purposes of the act should be deemed a corporate body, or any three or more of them, by indenture or indentures under their hands and seals, to convey and assure any or all of the said quays, &c., to any person or persons who might agree or who should have agreed to and for the purchase, sale, and disposal thereof; and that such conveyance and assurance should be a sufficient title to the same premises, and by force of that act should effectually vest in the purchaser or purchasers thereof, his, her, or their heirs and assigns, or the person or persons to whom

1837.

WILKINSON v. HALL.

he, she, or they should direct the same to be conveyed and assured, the fee-simple and inheritance of and in such quays, &c., as in such indenture or indentures should or might be mentioned and expressed, free and clear of and from all estates, rights, charges, and incumbrances whatsoever, save and except such rights, charges, estates, and incumbrances as the lord high treasurer or lords commissioners of his majesty's treasury, or such as the purchaser or purchasers, his, her, or their heirs and assigns, should have notice of before such conveyance and assurance should be completed." It is clear, therefore, that, under the indentures of lease and release of the 2nd and 3rd December, 1833, the plaintiff and Stennett acquired a parliamentary title to the premises in question in fee-simple: and it is equally clear that the plaintiff is a reversioner within the meaning of the 4 Geo. 2, c. 28, s. 1. *Doe* d. *Bristow* v. *Pegge*, 4 Doug. 309, 1 T. R. 760, n., *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 601, *Rex* v. *Edington*, 1 East, 288, (*a*) *Balls* v. *Westwood*, 2 Camp. 11, and numerous other cases, shew that a tenant coming in under the mortgagor, or under those from whom the mortgagor claims, cannot set up the title of the mortgagee, or that of any other person, so as to defeat the mortgagor's claim for rent. Independently of that, the proviso in the mortgage of the 4th and 5th December, 1833, that the mortgagee should not be entitled to call in the principal before the 5th December, 1840, the interest being in the meantime regularly paid, coupled with the further proviso that it should be lawful for the mortgagors, their heirs and assigns, "peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, with their appurten-

(*a*) Lord Kenyon there observes "Lord Mansfield, in the case of *St. Michael's, Bath*, said it was an affront to common sense to say that a mortgagor has no interest in the mortgaged premises."

1837.

WILKINSON v. HALL.

ances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their own respective use," until default should be made in payment of the principal or interest as provided by the deed, "without any let, suit, trouble, interruption, or disturbance whatsoever of or from or by the said W. Ellis [the mortgagee], his heirs or assigns, or of or from or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for him or them," the legal interest was vested in the plaintiff and Stennett; the proviso in law amounted to a lease for seven years. The interest being duly paid, the mortgagee could not have turned the mortgagors out by an ejectment; neither was he entitled to claim the rents and profits. A proviso is a covenant. In *Evans* v. *Thomas*, Cro. Jac. 172, one Howell, being seised of land in fee, covenanted with Williams to convey it by fine or other assurance to Williams and his heirs before the feast of Easter next following, to the use of him and his heirs, with a proviso, that, if he paid Williams 100*l.* at the end of thirteen years, then he might re-enter, and all assurances should be to the conusor; and covenanted and granted for him and his heirs with Williams and his heirs that he and his heirs should enjoy the land until the end of the said thirteen years, and after for ever if the 100*l.* was unpaid: and Williams covenanted that he would pay annually during the thirteen years two capons, and that during that period he would not commit waste: and the question was whether or not this covenant amounted to a lease for thirteen years. The Common Pleas held that it was not a lease, but merely a covenant. And that judgment was affirmed, on error. Tanfield, J., said, "that it had been adjudged in *Pleasance's* case, 1 Rol. 848, if one covenants and grants with another that he shall *have and hold* his lands for so many years, it is a good and absolute lease: but, if he covenants and grants that he shall *enjoy* his

land for ten years, it is not a lease, because it sounds only in covenant." Here, the words used are—"have, hold, occupy, possess, and enjoy." So, in *Powsely* v. *Blackman*, Cro. Jac. 659, one Curle, seised of land in fee, by indenture bargained and sold the lands to Perryman in fee for 300*l.*, with a proviso, that, if he paid to Perryman 300*l.* in this manner, viz. 10*l.* upon the 9th July, and 10*l.* upon the 9th January following, and so for nine other payments upon the said days, and upon the 9th January, 1617 should pay unto him 210*l.*, then the bargain and sale should be void: and it was provided and agreed between the parties that Perryman, his heirs or assigns, should not intermeddle with the actual possession of the premises or the perception of the rents thereof until default of payment was made of the said sums, or any part thereof. The question raised was, what interest Curle, the bargainor, had by this agreement with the bargainee that he should not intermeddle with the possession until default of payment, viz. whether he were lessee for so many years, or only in as tenant at will or sufferance; for, that it was not a covenant or agreement with the bargainee that he should enjoy it during those years, *for then it would have amounted to a lease for years;* but that the bargainee would not meddle with it, and to leave him in possession as he was, &c., which cannot be a lease for years. And it was held that this was not a lease for years, but only a lease for will, by reason of the negative words. In *Richards* v. *Sely*, 2 Mod. 80, it was held, that, if a copyholder, to secure a person who had become bound for him, covenant that such person shall hold and enjoy the copyhold estate for seven years, and so from seven years to seven years for and during the term of forty-nine years if the copyholder should so long live, it is a forfeiture of the estate, although there is a clause that the deed should be void on the bond being paid; for, this deed, though intended only as a collateral security, amounts to

1837.

WILKINSON v. HALL.

a present lease (*b*). In *Jemmot* v. *Cooly*, 1 Lev. 170, it was held, that, where a rent is granted in fee, with a proviso that the grantee may enter and retain until satisfied out of the profits, he may make a lease to try the title in an ejectment. So, here, the proviso enures as a lease, or at all events as a re-conveyance to the plaintiff and Stennett of an interest in the premises equivalent to a lease, so as to entitle them to maintain either an ejectment or an action for the rents and profits. The intention of the parties is to be collected from the whole of the deed taken together—*Rogers* v. *Humphreys*, 5 N. & M. 511. Looking at this deed, it is impossible to doubt that the intention was to convey the fee to the mortgagee, but to secure to the mortgagors, on condition of the due payment of interest, the legal right to "have, hold, occupy, possess, and enjoy" the premises; a right which they might maintain even against the mortgagee himself, and à fortiori against a tenant.

4. As to the time for which the double value was to be calculated.

4. The plaintiff is entitled to double value for the entire period during which the defendants wrongfully held over after service of the notice to quit and demand of possession. The notice to quit is in itself a sufficient demand of possession—*Wilkinson* v. *Colley*, 5 Burr. 2694. In *Soulsby* v. *Neving*, Lord Ellenborough says, 9 East, 313: "There is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment. The legislature considered that the single value might not in many cases be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover the possession by ejectment, but is cumulative. The two actions are brought diverso intuitu: the eject-

(*b*) The court there said: "The meaning of the parties must make a construction here; and that seems very strong that it is a good lease:" but they gave no judgment.

1837.

WILKINSON v. HALL.

ment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong." That disposes of the objection that the plaintiff cannot claim for double value beyond the day of the demise laid in the ejectment.

Bompas, Serjeant, for the defendants.—1. Doubtless a demise from year to year at a rent payable quarterly constitutes a yearly tenancy: but, where the demise has no reference whatever to a year, but is in terms confined to a quarter, it does not create a tenancy for term of years. [*Vaughan*, J.—The agreement contemplates the possibility of the tenancy continuing beyond the quarter.] That does not alter the character of the holding—*Kemp v. Derrett*, 3 Camp. 510. The notice of the 11th December, 1833, expressly treats this as a tenancy from year to year. There are many cases wherein it has been holden that a taking at so much per week or month, constitutes a weekly or a monthly tenancy; but none wherein a taking at so much per quarter has been held to create a tenancy from year to year. Lord Ellenborough's ruling in *Lloyd v. Rosbee* is to the point. He says: "A tenant for half a year, or a smaller portion of a year, may *for some purposes* be considered and be denominated a tenant for years; but *this is a penal statute, and is to be construed strictly.* I cannot, therefore, include a tenant from week to week in the description of tenants for life, lives, or years; and *I do not remember any instance of a tenant for less than a year being held within this statute.*" That the statute is penal, is clear both from its title, "An act for the more effectual preventing *frauds* committed by tenants," &c., and from the concluding words of the first section—"against the recovering of which said *penalty* there shall be no relief in equity." But, supposing this to be, within Littleton's definition, a tenancy for term of years,

1. That the tenancy created by the agreement of June, 12, 1832, was a yearly tenancy.

As to the form of declaring.

1837.

WILKINSON v. HALL.

the declaration is inaccurately framed: it should, according to Coke, have been a special declaration upon the truth of the case—"The writs original of the register (as Bracton saith, lib. 5, f. 413. b.) were formed, and of course had their first authority by act of parliament; and therefore, without an act of parliament they cannot be altered or changed, which is proved by the statute of Westminster 2, c. 24, whereby remedy is provided in many cases. But heare what Bracton saith—Sunt quædam brevia formata in suis casibus, et quædam de cursa, quæ concilio totius regni sunt approbata, quæ quidem mutari non possunt, absque eorundem contrariâ voluntate. Magistralia, autem, sæpè variantur secundum varietatem casuum &c. And this is the reason that in this case of half a yeare the words of the writ shall be without change, quod tenet ad terminum annorum, and *the plaintiff must make a speciall declaration according to his case*, for otherwise he should be without remedy."

2. As to the sufficiency of the notices to quit.

2. The notice of the 12th September, 1838, being given by a person having no authority, was insufficient. Property belonging to the crown cannot be said to vest in any individual, unless by statute; and then the party is strictly limited to the terms imposed by the statute. It is not denied that the lords of the treasury properly conveyed under the 2 & 3 Will. 4, c. 66. The property in the premises was by the 3 & 4 Will. 4, c. 51, s. 30, vested in Scovell, the person from whom the defendants took. By the express provision of the statute, Scovell was the landlord. The 30th section enacts, "that all manors, messuages, buildings, lands, tenements, and hereditaments which had theretofore been purchased, acquired, or taken for the use and service of his majesty's Customs, together with the rights, members, easements, and appurtenances to the same respectively belonging (other than and except such messuages, lands, tenements, and hereditaments, as may be of copyhold tenure), shall be and become, and remain

and continue vested in the secretary for the time being to the commissioners of his majesty's Customs, and his respective successors, as secretaries in such service, according to the respective nature and quality of the said manors, messuages, buildings, lands, tenements, and hereditaments, and the several estates and interests of and in the same respectively, in trust for his majesty, his heirs and successors, for the use and service of his majesty's Customs." Ker, the individual by whom the notice was signed, had no authority from Scovell. It is true, he was authorised by the commissioners: but they were strangers to the land; and their sanction was not given until the day after the service of the notice. A subsequent ratification of a notice given by an agent will not do—*Right* d. *Fisher* v. *Cuthell*, 5 East, 491, 5 Esp. 149 (*c*). The second notice treats the tenancy as a tenancy from year to year, which it clearly is not.

3. That the plaintiff had not such an estate in the premises as to entitle him to maintain the action.

3. The first and second counts both aver the reversion to be in the plaintiff and Stennett. If the tenancy be not a tenancy from year to year, there is an end of the first count: and the plaintiff cannot recover under the second without shewing that the reversion belonged to him quoad the moiety in respect of which he sues. There is nothing in the proviso relied upon on the other side, or in any other part of the deed, to prevent Wynn Ellis, the mortgagee, from maintaining an ejectment, whatever might be the effect which a court of equity would give to the instrument. The only covenant for payment of the principal has relation to the 5th June, 1834. Had the mortgagors tendered the principal and interest on that day, the mortgagee would have been bound to re-convey. There is no proviso for redemption at any other time: and default was made on that day. After default, the mortgagor is at most

(*c*) See Doe d. Rhodes v. Robinson, post, 396, 3 New Cases, 677, and the authorities there cited.

1837.

WILKINSON v. HALL.

only tenant at will to the mortgagee: and there is nothing to prevent a tenant from setting up the title of the latter against the former, unless he has come in under him. *Evans* v. *Thomas*, Cro. Jac. 172, and *Powsely* v. *Blackman*, Cro. Jac. 659, are authorities in the defendants' favour. In the former, all the court held that the instrument in question was not a lease—"For, the intent of the parties was, to make assurance of the inheritance by way of mortgage, which is but a covenant that he should enjoy during the time of the mortgage, and not to make a lease; for, if a fine had been levied, or a feoffment made, that had not been a lease; and the covenant that he and his heirs should enjoy it until the end of thirteen years, and in perpetuum if the 100*l.* were not paid, shews the intent that it should not be a lease, but merely a covenant for the quiet enjoying: and the covenant that he should not make any waste doth not expound it otherwise, but was to the intent that he, being but a mortgagee, should not commit any waste, for which otherwise there was not any remedy." And in *Powsely* v. *Blackman*, the instrument was held to be no lease to the bargainor for five years, but only in the nature of a lease at will, by reason of the negative words, that the bargainee should not intermeddle with the rents and profits for that time, and, consequently, so long was to leave the bargainor in possession as he was before; which shewed that the covenant of the mortgagee not to meddle before default, did not confer any greater estate than an estate at will. And see Bacon's Abridgment, *Leases* (K), citing these two cases. In *Drake* v. *Munday*, Cro. Car. 207, "by articles indented betwixt the testator and the defendant, it was covenanted, granted, and agreed, and the testator covenants, grants, and agrees with the defendant that he shall have and enjoy such an house and lands for six years; and that the testator will sufficiently repair the house: et in consideratione præmissorum, it is covenanted, granted, and agreed betwixt the said parties,

1837.

WILKINSON v. HALL.

and the defendant covenants, grants, and agrees for him, his heirs, executors, and assigns, to pay to the testator, his heirs, executors, and assigns an annual rent of 90*l.* during the said six years, at the feast of Annunciation and St. Michael: and upon this the defendant entered, and the testator died; and for 90*l.* arrear for one year after his death, the executor brings the action, and declares upon all this matter; and thereupon the defendant demurs: and now Henden, Serjeant, for the plaintiff, argued that this is merely in covenant, and shall not enure as a rent by way of reservation; and, if it be a covenant, it is due to the executor; and, if it be a reservation, it follows the reversion, and goes to the heir, and not to the executor: and he moved that so it appears to be the intent of the parties that it should be only as a covenant, and as a sum in gross, otherwise the words of the covenant were idle. And he relied upon the 10 Eliz., Dyer, 272, 5. b. And the rather it is a covenant, for that, ratione præmissorum, he covenants, which refers to more than the covenant to enjoy the lands &c. But all the court conceived that it is merely a rent, and ensues the reversion, and shall go to the heir; for, as the words of the covenant and grant that he shall enjoy the land for six years, amounts to a lease, and shall bind the heir, so the words of the covenant and grant of the lessee that he shall pay such a rent annually amounts to a reservation; and the rather because he covenants and grants to pay to him and his heirs." In *Smartle* v. *Williams*, 1 Salk. 245 (*d*), Holt, C. J., says: "Upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will." In *Birch* v. *Wright*, 1 T. R. 378, Buller, J., says: "It is now established that a mortgagor has an actual estate in equity, which may be devised, granted, and entailed; that the entails of it may be barred by fine and recovery; but that

(*d*) S. C. 3 Lev. 387, Comb. 247; best reported in the latter book.

1837.

WILKINSON v. HALL.

he only holds the possession of the land, and receives the rents of it, by the will or permission of the mortgagee, who may by ejectment, without giving notice, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will." *Keech* d. *Warne* v. *Hall*, Doug. 21, *Moss* v. *Gallimore*, Doug. 279, *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449, *Ex parte Temple*, 1 Glyn & J. 210, and *Pope* v. *Biggs*, 4 M. & R. 193, 9 B. & C. 245, are distinct authorities to the same effect: the possession of the mortgagor is in effect the possession of the mortgagee. And in Comyns's Digest, *Estates* (H. 1.), it is laid down, that, "If a mortgagee covenants that the mortgagor shall take the profits till default of payment, he shall be tenant at will to the mortgagee; or, that the mortgagor and his heirs shall take the profits, the heir after the death of his ancestor shall be tenant at will." Upon the whole, the result of the authorities seems satisfactorily to shew that the mortgagor has no greater estate in the premises than that of a tenant at will. He cannot, after default, maintain an action for rent, though due before the default happened.

4. As to the time for which the double value was to be calculated.

4. It is conceded that the plaintiff, if entitled to recover at all, will be entitled to claim the double value down to the time of the demise in the action of ejectment; but to that extent only—*Birch* v. *Wright*, 1 T. R. 378. To bring it within the statute, the holding over must be wilful and contumacious.

As to the count for use and occupation.

As to the count for use and occupation—The action should have been brought by Wynn Ellis, in whom was the legal estate, and not by the present plaintiff. No tenancy can be implied under a party who has not the legal estate—*Morgell* v. *Paul*, 2 M. & R. 303. In *Cobb* v. *Carpenter*, 2 Camp. 13, n., where premises came into the defendant's possession through J. S., who afterwards mortgaged to W. S., and assigned the equity of redemption to the plaintiff, it was ruled by Lord Ellenborough

1837.

WILKINSON v. HALL.

that he could only recover rent from the time when he acquired the legal estate from W. S. And in *Lumley* v. *Hodgson*, 16 East, 99, it was held that an action for use and occupation is maintainable without attornement, upon the statute 4 & 5 Anne, c. 16, ss. 9, 10, by the trustees whose title the tenant (the defendant) had notice of before he paid over his rent to his original landlord, though the tenant had no notice of the legal title being in the plaintiffs on the record.

Sir *F. Pollock*, in reply.—The presumption is in favour of a yearly tenancy; it is for the other side to shew clearly that a tenancy of a different character was intended by the parties. Then, if this be a yearly tenancy, it is beyond all question a tenancy for term of years within the meaning of the statute 4 Geo. 2, c. 28, s. 1. The character and description of the premises demonstrates the utter uselessness of a three months' holding. The notice given by Ker was clearly sufficient upon the facts stated in the case. It is said that default was made by the mortgagors on the 5th June, 1835, and that, from that time, they ceased to have any legal interest in the premises. That, however, is an erroneous construction of the deed. [*Vaughan*, J. Do you contend that the legal estate did not pass by the indentures of the 4th and 5th December, 1833, to Wynn Ellis?] The mortgage vested in the mortgagee the legal interest, subject to the right of the mortgagors *legally* to hold until the 5th December, 1840, they duly paying the interest in the meantime. This case is clearly distinguishable from all those cited on the part of the defendants; inasmuch as here the mortgagee does not simply covenant not to intermeddle; but that the mortgagors, their heirs and assigns, should peaceably and quietly "have, hold, occupy, possess, and enjoy the said wharf &c., and receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default." Reply.

1837.

WILKINSON v. HALL.

TINDAL, C. J.—This is an action of debt wherein the plaintiff in the first two counts of his declaration seeks to recover double the yearly value of one undivided moiety of the premises mentioned in the declaration, which he alleges the defendants to have wrongfully held over after service upon them of a notice to quit, and after demand of possession; and, in the third count, the single rent for six months, from the 13th December, 1833, to the 13th June, 1834.

The tenancy created by the agreement of June 12, 1832, a *quarterly* tenancy only.

In the first count, the plaintiff alleges that the defendants held and enjoyed one undivided moiety or half part of and in a certain quay or wharf, and certain warehouses, vaults, and buildings, with the appurtenances, as tenants thereof to the plaintiff, that is to say, as tenants thereof for a term of years, from year to year, for so long as the plaintiff and the defendants should respectively please. And, in the second, that the defendants, on the 13th December, 1833, and from thence until a certain day, to wit, the 14th December, in the same year, held and enjoyed one undivided moiety of the said tenements with the appurtenances, as tenants thereof to the plaintiff, for the residue and remainder of a certain tenancy for a term of years to them the defendants theretofore, to wit, on the 12th June, 1832, granted, the reversion of the one undivided moiety in that count mentioned of the said tenements with the appurtenances during all that time belonging to the plaintiff. The defendants pleaded to these two counts (amongst other pleas)—that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the term or time in the first count mentioned—and that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the residue and remainder of the supposed tenancy and term of years in the second count mentioned. The first question is, whether the allegation of tenancy contained in these two counts has been made out by the evidence. I am of opinion that it has

1837.

WILKINSON v. HALL.

not. The agreement of the 12th June, 1832, imports no more than a quarterly tenancy; and the allegation in the first count, that the defendants held "as tenants for a term of years, from year to year, for so long a time as the plaintiff and the defendants should respectively please," and in the second, that the defendants held the premises "as tenants thereof to the plaintiff, for the residue and remainder of a certain tenancy for a term of years," have not been made out. This appears also from the bond entered into by the defendants on the 13th June, 1832, which recites that the defendants had agreed to become tenants of the premises at the rent of 375*l.* a quarter; and that they had paid the first quarter's rent, and had agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they should hold the premises. These words appear to my mind to evidence an intention in the parties not to carry the tenancy beyond the quarter. There is nothing in the agreement or in the situation of the parties to render a quarterly holding inconsistent. The lords of the treasury, supposing they wished to sell the premises, would be likely to make a better bargain with a purchaser if they had the means of putting him in possession at the end of a quarter. But, admitting for a moment that the construction is doubtful or ambiguous, it seems that the parties themselves have understood and acted upon it in this sense; for, on the 12th September, 1833, the lords of the treasury gave the defendants notice to quit at the end of the ensuing quarter, and this notice was never objected to. The plaintiff therefore is not in my opinion entitled to recover on either the first or second count. We are not called upon to decide whether or not the statute 4 Geo. 2, c. 28, applies to the case of a holding by the quarter: the authorities cited on the part of the plaintiff, in favour of that position, cannot avail where the record is not properly framed.

As to whether the tenancy was within the 4 Geo. 2, c. 28.

With respect to the count for use and occupation—I agree, that, inasmuch as the defendants never paid any

As to the count for use and occupation.

1837.

WILKINSON v. HALL.

rent to the plaintiff, nor in any way acknowledged the plaintiff for their landlord, they are not estopped in a court of law from attempting to shew that he has no title. Whether the plaintiff has or has not a right to sue, depends upon the construction of the deed of the 4th and 5th December, 1833. It appears that the plaintiff and his partner, William Stennett, purchased the property, and that it was conveyed to them by the lords of the treasury and the commissioners and secretary of the Customs, by indentures of lease and release bearing date the 2nd and 3rd December, 1833; and that, by indentures of lease, appointment, and release, dated the 4th and 5th December, in the same year, the plaintiff and Stennett, in consideration of 13,000*l.*, conveyed the same to Wynn Ellis.

As to the construction and legal effect of the deed of 4th and 5th Dec. 1833.

The question is, what was the legal effect of that deed, and how it affected the legal right. Under that deed, there can be no doubt but that the fee-simple in the premises vested in the mortgagee from the day of the execution of the appointment; and that the proviso for a re-conveyance on payment of principal and interest on a given day, being only a proviso subsequent for the benefit of the mortgagor, does not affect the legal right of the mortgagee. But, looking at the subsequent part of the deed, the question is whether it does not operate as a re-demise of the premises to the mortgagors for a term of seven years, the interest being in the meantime regularly paid. I am of opinion that it has that effect. After the proviso for redemption on payment of the principal sum and interest on the 5th June, 1834, comes a proviso that the mortgagee "should not be entitled to call in the principal money by him advanced upon the said mortgage before the 5th December, 1840, if the interest payable by the mortgagors in respect of such principal money was in the meantime regularly paid according to the terms of the said deed:" and a further covenant that "it should and might be lawful for the plaintiff and Stennett respectively, and their respective heirs and assigns, peaceably and

1837.

WILKINSON v. HALL.

quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof and of every part thereof, for their respective own use, until default should be made in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption, or disturbance whatsoever of or from or by the said Wynn Ellis, his heirs or assigns, or of or from or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for him or them." It is contended on the part of the defendants that this power is only reserved to the plaintiff on condition of his paying the principal and interest on the 5th June, 1834. But the mortgagee expressly covenants not to call in the principal until the 5th December, 1840. In order to ascertain the meaning of the parties, all the covenants must be looked at together; and, so looking at them, the intention seems to me to be perfectly clear, that the plaintiff and Stennett were not to be disturbed in their possession until 1840, provided the interest were in the meantime duly paid. This gave them the legal estate for seven years, defeazible nevertheless at the end of each half year in case of default of payment of interest. What injury could possibly result to the mortgagee from permitting the mortgagors to continue in possession and to receive the rents and profits, so long as the power is reserved to him to enter upon the first default? I think the case falls within the principle that is well laid down in Bacon's Abridgment, *Leases*, K. (which title is supposed to have been written by Lord Chief Baron Gilbert)—"that, whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession,

1837.

WILKINSON v. HALL.

and the other come into it, for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose." I am of opinion therefore that the plaintiff had in him such an estate as to entitle him to a verdict and judgment on the third count, for use and occupation of the premises by the defendants from the 13th December, 1833, to the 13th June, 1834.

PARK, J., concurred.

GASELEE, J., having heard no part of the argument, gave no opinion.

VAUGHAN, J.—There is nothing on the face of the agreement of the 12th June, 1832, or in the bond entered into on the day following, to warrant an inference that a yearly tenancy was either created or intended by the parties to be created. There is no mention but of a quarterly rent: and the bond is taken in the penal sum of 700*l.*, something less than the double amount of a quarter's rent. I am clearly of opinion that the tenancy was but from quarter to quarter.—Whether the words of the statute 4 Geo. 2, c. 28, s. 1, apply to anything short of a yearly holding, is a grave question, and one upon which I shall be prepared to give an opinion whenever it may fairly present itself.—I think the plaintiff is entitled to recover on the third count, for use and occupation. All the provisions of the deed of the 4th and 5th December, 1833, studiously evince an anxiety in the parties to reserve the legal right and complete and entire control over the property in the mortgagors, notwithstanding the conveyance of the fee to the mortgagee. Paying the half-yearly interest, the former had a clear right to hold the premises until the 5th

December, 1840. All that is necessary to support an action for use and occupation, is, an occupation by the defendant by the sufferance and permission of the plaintiff. The simple question, therefore, here is, whether these defendants have occupied the premises in question by the permission of the plaintiff and his co-joint-tenant: and this is clearly to be inferred from the situation of the parties.

1837.

WILKINSON v. HALL.

Judgment for the defendant on the first and second counts; for the plaintiff on the third.

CORNISH and SIEVIER *v.* KEENE and Another.

Monday, Jan. 30th.

THE declaration, after stating that the plaintiff Robert William Sievier, before and at the time of making the letters patent thereinafter mentioned, was the true and first inventor of a certain improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes, and mentioned in the letters patent thereinafter in part set forth, set out the letters patent; and then, after alleging that Sievier assigned an undivided moiety of the interest in the invention to Cornish, averred that Sievier always from the time of the granting the said letters patent as aforesaid, down to and at the time of the making the assignment of the

The plaintiff took out a patent "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes," and in his specification, which was inrolled in July, 1833, described his invention, in general terms, to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same might be applicable to; and then described more particularly three distinct objects which he proposed. The third object proposed by the plaintiff was, "to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which should be interwoven elastic cords or strands of Indian rubber coated or wound round with filamentous material:" he afterwards described the mode of effecting that object to be, "by introducing into the fabric threads or strands of Indian rubber which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise; these strands of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required; that, by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, he was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportion of the elastic and non-elastic material:" adding, "that the strands of Indian rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent, and, being in that state introduced in the fabric, they acquired their elasticity by the application of heat after the fabric was made:"—Held, that this invention was properly the subject matter of a patent, and that it was sufficiently described in the specification.

1837.

CORNISH v. KEENE. Declaration.

said part, share, or interest therein to Cornish, did, and they the plaintiffs Cornish and Sievier thenceforth had always by themselves and their servants and agents in that behalf, made and exercised, and vended the said invention, to their great advantage and profit respectively; yet the defendants, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiffs, and to deprive them of the said profits, benefits, and advantages, which they might and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters patent, and after the said assignment by Sievier of the said part, share, or interest therein, to Cornish as aforesaid, and after the plaintiffs so became interested therein as aforesaid, and within the term of years in the letters patent mentioned, to wit, on the 1st April, 1834, and on divers other days and times between that day and the commencement of this suit, within that part of the United Kingdom of Great Britain and Ireland called England, our lord the king's dominion of Wales, and the town of Berwick-upon-Tweed, unlawfully and unjustly, and without the licence, consent, or agreement of the plaintiffs, or either of them, in writing under their or either of their hands and seals, or otherwise howsoever, for that purpose had and obtained, and against the will of the plaintiffs and each of them, did make, use, and put in practice the said invention, and divers parts of the same, and did also, on the several days and times aforesaid, counterfeit, imitate, and resemble the said invention, and, on the several days and times aforesaid, did also make and cause and procure to be made divers additions to, and divers subtractions from, the said invention, whereby they pretended to be the inventors or devisers thereof; and, on the several days and times aforesaid, did vend and sell, and caused and procured to be vended and sold, divers large quantities, to

1837.

CORNISH v. KEENE.

wit, fifty thousand pieces and one million yards of certain elastic goods and fabrics manufactured according to and by means of the said invention, and divers large quantities of elastic goods and fabrics, to wit, fifty thousand pieces of elastic goods, and one million yards of a fabric in imitation of certain elastic goods and fabrics manufactured by the plaintiffs, by themselves, their servants, and others employed by them, by means of the said invention, in breach of the said letters patent, and against the privilege so granted to the plaintiff Sievier and his assigns as aforesaid; whereby the plaintiffs had been and were greatly injured, and deprived of a great part of the profits and advantages which they might and otherwise would have derived and acquired from the said invention: to the damage of the plaintiffs of 3,000*l.*

The defendants pleaded—first, not guilty—secondly, that the plaintiff Sievier was not, before and at the time of the making of the said letters patent, the true and first inventor of any improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes, in manner and form as the plaintiffs had in their declaration in that behalf alleged; concluding to the country—thirdly, that the said alleged invention or discovery in the said letters patent and instrument in writing mentioned, described, and ascertained, was not, before and at the time of the making of the said letters patent, a new invention as to the public use and exercise thereof in that part of the United Kingdom of Great Britain and Ireland called England, Wales, or Berwick-upon-Tweed, nor was the same invented or found out by Sievier, by reason whereof the said letters patent were wholly void; verification—fourthly, that the invention was not an improvement in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes; concluding to the country—and, lastly, that the plaintiff Sievier did not particularly describe and

First plea.

Second plea.

Third plea.

Fourth plea.

Fifth plea.

1837.

CORNISH v. KEENE.

ascertain the nature of his alleged invention, and in what manner the same was to be performed, by any instrument in writing, in manner and form as the plaintiffs had in their declaration in that behalf alleged; concluding to the country.

Issue being joined on these pleas, the plaintiffs at the trial before Tindal, C. J., and a special jury, at the Sittings in Middlesex after last Trinity Term, gave in evidence the following specification of the invention of Sievier, sealed on the 17th January, 1833, and inrolled in the month of July following:—

Specification of the plaintiffs' patent.

"My invention of an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes, is designed for the production of an elastic web cloth, or other manufactured fabric, for bandages, and for such articles of dress as the same may be applicable to.

First object.

"The first object which I propose, is, to manufacture an article by the ordinary knitting frame, or similar kind of machinery, in which cords or strands of Indian rubber shall be introduced between the loops or stitches of the fabric, for the purpose of forming elastic cords or bands round the margins or other parts of stockings, socks, gloves, night-caps, drawers, and various other articles of

Second object.

clothing. The second object, is, to manufacture in the ordinary loom an elastic woollen cloth, by the introduction of cords or strands of Indian rubber among the longitudinal threads or yarns which constitute the chain or warp, and also among the transverse threads or yarns which constitute the weft or shoot, and which cloth shall be capable

Third object.

of being afterwards felted and dressed with a nap. The third object is, to produce cloth from cotton, flax, or other suitable material not capable of felting, in which shall be interwoven elastic cords or strands of Indian rubber, coated or wound with a filamentous material." After describing the manner in which the first and second objects

1837.

CORNISH v. KEENE.

were attained, the specification proceeded, with reference to the third, as follows:—" In manufacturing an elastic cloth from cotton, flax, or other material which is not intended to be milled or felted, I introduce into the fabric threads or strands of Indian rubber, which have been previously covered by winding filaments tightly round them through the agency of an ordinary covering machine, or otherwise; these strands of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required. By thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, I am enabled to produce a cloth which shall afford any required degree of elastic pressure, according to the proportions of the elastic and non-elastic material. It remains only to add that the strands of Indian rubber are, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in my former specification; and, being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made.

" Lastly, as my invention consists solely in the employment of strands of Indian rubber in connection with yarns in the way described, for manufacturing elastic goods or fabrics, I have not deemed it necessary to describe any particular kind of machinery for carrying the same into effect, as such machinery is well known and forms no part of my invention."

Evidence on the part of the plaintiffs.

As to the first and second objects of the patent, there was no contest. The plaintiffs' witnesses stated, that, as to them, Sievier's invention had effected an improvement not in public use before; and no witnesses were called on the part of the defendant to contradict this. As to the third object, several scientific witnesses called on the part of the plaintiffs proved that Sievier's invention had effected a decided improvement; that the article produced was lighter, more porous, and yielded more than any that had

1837.

CORNISH v. KEENE.

preceded it, adapting itself more easily to the human form, and was considerably cheaper: medical witnesses also proved that for these reasons it was extremely valuable in surgical cases. Several persons conversant with the trade also deposed that there were not above six or seven manufacturers of similar articles in London; that, previously to the date of Sievier's patent, they had never seen such an article as his in the market; and that it was extensively sold in March and April, 1833. A witness, who had been in the service of the defendants from October, 1832, down to April, 1833, proved that they had never during that period manufactured the articles in question.

Evidence on the part of the defendants.

The defendant's witnesses, on the other hand, spoke disparagingly of the article: some of them saying they had at one time made it, but soon discontinued the manufacture of it, and resumed that of the article made solely of elastic threads. To shew that the invention was not new, the defendants called several witnesses, who said they had made and vended the article before the date of Sievier's patent, and that the defendants themselves had made it a year before that period. A former patent of Sievier's and another of one Thomas Hancock, were also put in, which, as was insisted on the part of the defendants, comprehended Sievier's supposed invention. These patents were as follow:—

Sievier's first patent.

Sievier's first patent—sealed, Dec. 1, 1831; inrolled, June, 1832.

"This invention consists in the application or employment of filaments, threads, or strands of caoutchouc or Indian rubber to or for the making, manufacturing, or constructing of elastic cables, ropes, whale fishing and other lines, lathe and rigger bands, bags, and purses; such filaments, threads, or strands of caoutchouc or Indian rubber being previously platted over or covered with hemp, flax, silk, wool, cotton, catgut, Indian grass, strips of leather, or other fit and proper materials; part of which

articles when so manufactured are applicable to various other purposes. As filaments or threads of Indian rubber, covered with cotton, silk, and other materials, are now commonly used in the manufacture of many articles where elasticity is required, and as such filaments or threads are covered with different materials by various kinds of machines applicable to the purpose, it is not necessary for me to describe any particular machinery by which the filaments, threads, or strands of Indian rubber, required for the different articles to be manufactured in my improved manner are to be platted, intermixed, or covered with the materials. I therefore shall only state generally, that the filaments, threads, or strands of caoutchouc, are prepared by cutting them from any convenient sized or shaped piece of Indian rubber into long strips, which are afterwards stretched to their utmost tension, and wound upon drums, reels, or bobbins, ready to be platted over or covered by, or interwoven with, the various materials before mentioned. [After describing the mode of applying the invention in the manufacture of cables &c., the specification proceeded:] My improved bags and purses are composed of knitting or net-work, made of strands or cords of the filaments prepared as above described, and which are capable of being made into purses or bags by hand; or the filaments, strands, or cords, prepared as above described, may be knitted, netted, or platted into purses or bags, by machinery or by hand. As there are so many descriptions of bags to which these improvements in the construction may be applicable, it is not necessary to state further than that in any case where elasticity may be required the bag or purse may be made wholly of the above materials, or only parts used; for instance, in making carpet travelling-bags, I should only form the ends or edges of the bag of the elastic material, covered, when stretched to its utmost extension, with leather, or other suitable substance, which will be capable on collapsing, of drawing up the leather, or other covering, into puckers or gathers, so as to allow of the bag

1837.

CORNISH v. KEENE.

enlarging very considerably when any extra quantity of articles is put into it."

Hancock's Patent.

Hancock's patent—sealed and inrolled, Aug. 8, 1820.

"Invention of an application of a certain material to various articles of dress and other articles, that the same may be rendered more elastic.

"The material I use is caoutchouc: I cut it into slips of a convenient length and thickness, according to the purpose for which it is to be used, and the degree of elasticity necessary. If the quality of the caoutchouc is not the best, or the spring is not required to be very substantial, I prepare these slips by putting them into hot water, and steeping them awhile to prevent their cracking on the edges: when the substance of the spring is required to be more considerable, or the quality of the caoutchouc better, I use it without such preparation. I apply the caoutchouc spring to gloves in the following manner:—A case or pipe of leather, linen, or cotton, or other similar material, is made as long as it is necessary the spring should stretch; the spring is then fastened at the extremities of the pipe or case, by sewing or otherwise, in such a manner as that the pipe may contract and gather up very considerably. The case or pipe is then fixed in the wrist of the glove so as to contract the glove to the size of the wrist, care being taken not to make the spring so strong but that the glove will easily draw over the hand. The case or pipe may be made in the glove itself, and the spring be introduced in the manner I have described. Attention must be paid in fastening the caoutchouc that it is not pierced any where between the extremities by the needle, otherwise it will be liable to tear and break. In a similar manner I apply the caoutchouc spring to any other article of dress where elasticity is desirable at any particular part. I apply the caoutchouc springs to waistcoats and waistbands, to make them contract and sit close to the body; to coat sleeve linings, to draw them closer round the wrist; to the mouth of pockets, to prevent their contents from falling out when

in an inverted position, and prevent their being easily picked; to trowsers and to gaiter straps, to enable them to lengthen and shorten to the bend of the knees and ankle joints; to braces, instead of wire and other springs, as now commonly used; to stockings, to prevent their slipping down the leg; to garters; to shirt wrists; to the knees of drawers and breeches; to wigs, false curls, and fronts, to keep them tight on the head; to pocket-books and purses, instead of the strap and loop, and wire springs; to riding belts; to stays, and such part of the apparel and dress of women as require to be kept close to the person, and yet to be elastic; as fastenings to boots, shoes, clogs, and pattens, when the object is to take them off and on without any difficulty, in lacing or tying: I apply caoutchouc to the soles of boots, shoes, and clogs, by making either the whole sole of caoutchouc, or the inner or outer sole only, or by fastening a piece of caoutchouc between the soles; and, in either case, boots, shoes, and clogs are rendered more elastic to the foot. I apply the caoutchouc springs to stiffners for neckcloths. I use caoutchouc in springs to render them elastic to the foot, by forming a piece to the bottom of the stirrup, which I fasten in by having holes drilled in the stirrup and sewing in the caoutchouc with wax-thread or wire, or by rivetting or screwing it on with iron.

"In this specification I do not insist upon any particular mode of applying or fastening caoutchouc to the various articles described, as that may be varied as convenience may require; my object being to produce and apply a better kind of spring than any now in use for the purposes above mentioned."

His Lordship left it to the jury to say whether Sievier's invention was an improvement; and whether it was in public use and operation at the time the letters patent were granted.

A verdict was found for the plaintiffs, with liberty to the

1837.

CORNISH v. KEENE.

defendants to move to set it aside upon any objection arising out of the specification or former patents.

Sir *F. Pollock*, in Hilary Term last, moved to enter a nonsuit, on the grounds that the invention in question was not properly the subject of a patent, the cloth the plaintiffs proposed to make being a mere combination of what was known before—*Saunders* v. *Aston*, 3 B. & Adol. 881; and that the specification did not sufficiently explain the process by which the patentee introduced the Indian rubber thread: and also for a new trial, on the ground that the verdict was against the weight of evidence, particularly with regard to the effect of the former patents; and that since the trial the defendants had discovered that a patent had been taken out by one Desgrand, in November, 1832, and inrolled in May, 1833, for the same objects as Sievier's patent.

Sir *J. Campbell*, A. G., *Wilde* and *Stephen*, Serjeants, and *Hindmarsh*, shewed cause.—The first objection involves two points—first, whether this was a new manufacture—secondly, whether it is sufficiently described in the plaintiffs' specification. That it was a manufacture will not be disputed; the jury, the most appropriate tribunal, having by their verdict decided that it was new; and the description in the specification is perfectly intelligible. But it is not competent to the defendants, on the present state of the pleadings, to urge an objection to the sufficiency of the specification: the last plea, the only one at all applicable, merely states that the plaintiffs did not describe the nature of the invention by any instrument in writing; not that it was insufficiently described. Under such a plea, it is only competent to the defendants to shew the absence of a specification; as, under a plea of *no* award, or no memorial, the party can only shew the non-existence of the award or memorial, and cannot give evi-

1. As to the novelty of the invention.

dence that it is insufficient. In *Derosne* v. *Fairie*, 2 C. M. & R. 476, 5 Tyr. 393, the court of Exchequer doubted whether the insufficiency of the specification could be objected to under a plea precisely the same as the present. And, in *Praed* v. *The Duchess of Cumberland*, 4 T. R. 585, to debt on an annuity bond, the defendant pleaded that no such memorial of the annuity as is required by law was inrolled; and, upon the plaintiff setting forth the memorial, a rejoinder that the memorial did not truly set forth the consideration, was held a departure from the plea. *Simmons* v. *Hunt*, 1 Marsh. 155, and *Flight* v. *Buckeridge*, 11 Moore, 28, 3 Bing. 215, are authorities to the same effect. In *Morgan* v. *Man*, 1 Sid. 180, and *Roberts* v. *Marriett*, 2 Wms. Saund. 188, the like principle was applied to a plea of no award.—With respect to the finding of the jury, there being evidence on both sides, the court will not interfere; and according to *Lewis* v. *Marling*, 10 B. & C. 22, *Jones* v. *Pearce*, Godson (sup.), 65, and *Dollond's* case, Godson, 55, whether or not the invention has been in public use and operation before the date of the patent, is entirely a question for the jury. *Webster* v. *Uther*, Godson, 64, turned, not upon the question of previous publication, but on the fact that the plaintiff had learned the invention from the defendant. The subsequent discovery of Desgrand's patent is no ground for a new trial, since the plaintiffs' manufacture was in full sale in March and April, 1833, and Desgrand's patent was not inrolled till May in the same year.

2. As to the evidence.

3. As to the subsequent discovery of Desgrand's patent.

Sir *F. Pollock*, *Cresswell*, and *Knowles*, in support of the rule.—Sievier's invention consists only in the combination of two things, neither of which is new—the thread of Indian rubber, with the linen or cotton thread—and therefore not the subject of a patent, as was distinctly laid down in *Saunders* v. *Aston*, 3 B. & Ad. 881, where a patent was taken out for improvements in making buttons; the

1. As to the novelty of the invention.

1837.

CORNISH v. KEENE.

specification stated the improvement to consist in the substitution of a flexible material for metal shanks, and it described the mode in which that material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help, among other things, of a metal collet or ring with teeth; neither the construction of the button, nor the application of a flexible shank, was new; the use of the toothed ring, as described in the specification, was so, but that was not stated to be the subject matter of the invention; and it appeared by the specification that the effect produced by it might be brought about in other modes, which the plaintiff had also used: it was held that the patent was not sustainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, not being the object of the invention, but only a mode, among others already known, of carrying it into effect. The same principle was laid down in *Brunton* v. *Hawkes*, 4 B. & Ald. 541. As to the third object, therefore, the patent is clearly void; and, if void for one of several objects, it is void for the whole. In *Brunton* v. *Hawkes*, Bayley, J., says: "If a patent is taken out for many different things, the entire discovery of all those things is the consideration upon which the king is induced to make the grant. That consideration is entire, and if it fails in any part it fails in toto. Upon an application for a patent, although the thing may be new in every particular, it is in the judgment of the crown whether it will or will not, as matter of favour, make the grant to the person who has made the discovery. And, when an application is made for a patent for three different things, it may be considered by the persons who are to advise the crown as to the propriety of the grant, that the discovery of the three things together, may form the proper subject of a patent, although each per se, would not induce them to recommend the grant.

1837.

CORNISH v. KEENE.

It seems to me, therefore, that, if any part of the consideration fails, the patent is void in toto." The specification, therefore, in the present case being *wholly* void, the defendants are entitled to a nonsuit. The fifth plea is clearly sufficient to sustain the objection; it does not state that there was no specification, but that the plaintiffs have not described the nature of the invention by any instrument in writing. The cases cited have no sort of application. *Dudlow* v. *Watchorn*, 16 East, 39, however, is an authority strongly in favour of the plea: there, bail sued in scire facias upon their recognizance, pleaded that no ca. sa. was *duly* sued, returned, and filed against the principal according to the custom and practice of the court; the plaintiff in reply shewed a writ of ca. sa. issued into Middlesex: and it was held no departure for the defendants to rejoin that the venue in the action against the principal was laid in London; for that sustained the plea. *Lysaght* v. *Walker*, 3 Tyr. 234, 5 Bligh, N. S. 1, is to the same effect.—With respect to the prior publication of this invention—in *Lewis* v. *Marling*, the only previous publication was a sight of the model; and in *Jones* v. *Pearce* and *Dollond's* case, the use of the machinery by an individual. Here, however, the defendants shew that there were already two patents granted for a similar invention; and, according to the evidence adduced on the part of the defendant, the article had been sold repeatedly in the market before the date of the plaintiffs' patent; and that fact is uncontradicted by the evidence offered by the plaintiffs. Upon this ground, therefore, the verdict is clearly against the weight of evidence.

2. As to the evidence.

3. As to Desgrand's patent.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: The discussion in this case arises on a motion to the court to set aside a verdict obtained by the plaintiffs, as

1837.

CORNISH v. KEENE.

assignees of the original patentee, in an action for the infringement of a patent, and to grant a new trial, upon three grounds—first, that, in point of law, the invention for which the patent was taken out was not the subject-matter of a patent—secondly, that the verdict was against the evidence given at the trial—and, thirdly, upon facts disclosed in an affidavit.

The patent in question, which bore date the 17th January, 1833, was "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes," and the patentee, in his specification, which was inrolled in July, 1833, described his invention in general terms to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same might be applicable to. And then described more particularly the three distinct objects which the patentee proposed.

At the trial of the cause, it was admitted, on the part of the defendants, that the principal ground on which the patent was sought to be impeached, was, with reference to the third object described in the specification; and the whole of the evidence produced by the defendants, and the main part of the argument before us applies itself to that object alone.

The third object proposed by the patentee was, "to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords or strands of Indian rubber, coated or wound round with filamentous material." The patentee afterwards describes the mode of effecting the third object to be, by introducing into the fabric threads or strands of Indian rubber, which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise: these strands of Indian rubber being applied as warp or weft, or as both,

1837.

CORNISH v. KEENE.

according to the direction of the elasticity required. That by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, the patentee was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportions of the elastic and non-elastic material." The patentee added, "that the strands of Indian rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent; and, being in that state introduced in the fabric, they acquired their elasticity by the application of heat after the fabric is made."

First point.—As to the novelty of the invention.

Now, the first objection made to the patent so described, is, that the invention is not the subject-matter of a patent: that is neither a new manufacture, nor an improvement of an old manufacture; but is merely the application of a known material in a known manner to a purpose known before. The question, therefore, as to this point, is, does it come under the description of "any manner of new manufacture," which are the terms employed in the statute of James? That it is *a manufacture*, can admit of no doubt; it is a vendible article produced by the art and hand of man; and of all the instances that would occur to the mind when inquiring into the meaning of the terms employed in the statute, perhaps the very readiest would be that of some fabric or texture of cloth. Whether it is new or not, or whether it is an improvement of an old manufacture, was one of the questions for the jury upon the evidence before them; but that it came within the description of a manufacture, and so far is an invention which may be protected by a patent, we feel no doubt whatever. The materials indeed are old, and have been used before; but the combination is alleged to be, and, if the jury are right in their finding, is, new, and the result or production is equally so. The use of elastic threads or strands of Indian rubber previously covered by

1837.

CORNISH v. KEENE.

filaments wound round them, was known before; the use of yarns of cotton or other non-elastic material was also known before; but the placing them alternately side by side together as a warp, and combining them by the means of a weft when in extreme tension and deprived of their elasticity, appears to be new; and the result, namely, a cloth, in which the non-elastic threads form a limit up to which the elastic threads may be stretched, but beyond which they cannot, and therefore cannot easily be broken, appears a production altogether new. It is a manufacture, at once ingenious and simple. It is a web combining the two qualities of great elasticity, and a limit thereto.

Second point.—As to the evidence.

The second objection to the verdict is, that it is against the evidence. The only issue to which this objection has applied itself in the course of the argument, is, the issue whether the invention was new as to the public use thereof in England. Now, the evidence at the trial which applied itself to this question consisted of two perfectly distinct heads or classes; the documentary evidence of former patents and specifications, and the parol testimony of the witnesses. It was urged that the present invention was, in the whole, or a material part of it, already known to the public by the specification to the patent obtained by Hancock, which was inrolled in August, 1820, and the specification to the former patent inrolled by Sievier in June, 1832. As to Hancock's patent, it is manifest, that, if it applied at all to the invention for which the patent now under discussion was taken out, it applied only to the first object stated in the specification; all contention as to which object was given up at the trial. But the description in Hancock's patent shews a material distinction between his discovery and that of Sievier. Hancock's patent was taken out for a discovery "of the application of a certain material to certain articles of dress, by means of which the same may be rendered more elastic;" and the

Hancock's patent.

1837.

CORNISH v. KEENE.

mode by which this was effected is described in the specification to be that of "applying strips of Indian rubber into cases or pipes formed in the article after it was complete." The first object of Sievier's patent, is that of introducing the cords or strands of Indian rubber between the loops or stitches of the fabric, so as to form a constituent part of the fabric itself. And, as to the former patent of Sievier, it was a patent taken out for the making of cables, ropes, whale-fishing and other lines, lathe and rigger bands, bags, and purses, of filaments or threads of Indian rubber covered with cotton or other materials; the bands and bags were to be knitted, not woven; and there was no attempt to mix with them any non-elastic material to strengthen them, or to form a limit to their elasticity, or for any other purpose. These patents, therefore, do not by any means, as it appears to us, impeach the novelty of the present invention.

Sievier's first patent.

As to the evidence of the various witnesses brought forward on each side at the trial, it must be admitted that there was evidence on both sides. The question raised for the jury was this—whether the various instances brought forward by the defendants amounted to proof, that, before or at the time of taking out the patent, the manufacture was in public use in England, or whether it fell short of that point, and proved only that experiments had been made in various quarters, and had been afterwards abandoned. This question is from its nature one of considerable delicacy; a slight alteration in the effect of the evidence will establish either the one proposition or the other, and the only proper mode of deciding it, is, by leaving it to the jury. On the present occasion, they heard the evidence patiently, and appeared to apply it with intelligence; and, we can see no reason to be dissatisfied with the conclusion at which they arrived.

With respect to the third ground upon which the rule to shew cause was obtained in this case, viz., that since the

Third point.—Desgrand's patent.

1837.

CORNISH v. KEENE.

trial the defendants have discovered a patent taken out by one Desgrand, the patent being sealed in November, 1832. Without entering into the question whether the invention for which the patent in dispute was taken out was or was not described in the specification of Desgrand, we think it sufficient to observe that this specification was not inrolled till May, 1833, whereas the article made under the plaintiffs' patent was publicly made and sold upon the London market to a very large extent in March and April of the same year. And, although the specification of Sievier's patent was not inrolled till July, 1833, we think the mere fact of the inrolment of Desgrand's specification after the plaintiffs' patent was sealed, and his discovery known upon the market, does not of itself alone afford any proof whatever of the want of novelty in the manufacture made under the plaintiffs' patent.

We therefore think there is no ground for disturbing the verdict, and that the rule for a new trial must be discharged.

Rule discharged.

Tuesday, Jan. 31st.

HOLLIDAY *v.* LAWES.

It is not necessary in an affidavit to hold to bail to shew any connection between the deponent and the plaintiff: it is enough that the existence of the debt is positively sworn to, without shewing the deponent's means of knowledge of its existence.

THE defendant was on the 19th December last arrested on a capias issued at the suit of the plaintiff for 119*l.* The writ having been set aside for irregularity, the plaintiff, without the sanction of a judge's order, issued a second writ. In order to prevent the defendant from being arrested on this second writ, his attorney gave an undertaking to put in bail. The affidavit of debt was as follows:— "William James Holliday, of &c., soap-manufacturer, maketh oath and saith that Thomas Lawes is justly and truly indebted to John Holliday in 119*l.* and upwards, for

After an undertaking by the defendant's attorney to put in bail, in order to prevent an actual arrest (the party having already been arrested for the same debt, and discharged on the ground of an irregularity in the process), the defendant cannot object that the second arrest was improper, for want of a judge's order.

money paid by the said John Holliday for the use of the said Thomas Lawes, at his request." A judge's summons was obtained calling on the plaintiff to shew cause why the bail-bond given by the defendant on the second arrest should not be delivered up to be cancelled, on his entering a common appearance, on the ground that the affidavit to hold to bail was defective, inasmuch as it shewed no connection between the deponent and the plaintiff whence the former might be presumed to have any means of knowing that the debt sworn to existed. The learned judge declined to entertain the question, but stayed the proceedings until the fifth day of the present term, to give the defendant an opportunity to apply to the court; the plaintiff to be at liberty to declare in the mean time.

Wilde, Serjeant, accordingly, on a former day, obtained a rule nisi that the bail-bond might be delivered up to be cancelled, as well on the ground above stated, as on the ground that the second arrest, there being no judge's or- to warrant it, was irregular.

Atcherley, Serjeant, now shewed cause.—There is no ground whatever for the first objection: the deponent swears positively to the existence of the debt; and that is all that the practice of the court requires. *Tindal*, C. J.—It is usual to shew some connection between the deponent and the plaintiff.] In *King* v. *Lord Turner*, 1 Chit. 58, it was expressly held that it is not necessary that the creditor should himself swear to the debt; but that it suffices for another person to swear positively that the defendant is indebted to the plaintiff, without shewing that the deponent is agent of or in any way connected with the plaintiff. *Brown* v. *Davis*, 1 Chit. 161, *Pieters* v. *Luytjes*, 1 B. & P. 1, *Lee* v. *Selwood*, 9 Price, 322, and *Short* v. *Campbell*, 3 Dowl. 487, are all authorities to the same effect. And in *Andrioni* v. *Morgan*, 4 Taunt. 231, it was held to

1837.

HOLLIDAY v. LAWES.

be no objection that the affidavit stated that the plaintiff resided in a foreign country, and that it did not appear how the deponent could know that fact. The affidavit in the present case, therefore, is clearly sufficient.—The second objection is equally untenable. A judge's order for a second arrest is only necessary after a non-pros., nonsuit, or discontinuance, which may in some degree be said to be the act of the plaintiff: but it is not necessary where the first arrest has been set aside by the court or a judge for a mere irregularity. In *Richards* v. *Stuart*, 3 M. & Scott, 778, 10 Bing. 323, which in its circumstances approximates very closely to the present case, there was no rule of court or order of a judge for the second arrest. At all events, the objection was waived by the undertaking of the defendant's attorney to put in bail.

Wilde, Serjeant, in support of his rule.—Whatever the practice formerly, it has been usual in modern times to require the deponent to shew the connection between himself and the plaintiff, in order that the defendant may appear not to have been improperly deprived of his liberty. *Pieters* v. *Luytjes* and *Andrioni* v. *Morgan* are excepted cases, and bear on the face of them a sufficient reason for the exception: in the former, the plaintiff resided at Amsterdam, and the cause of action was a written obligation signed by the defendant; and the latter was the case of an action on a bill of exchange, the plaintiff in which, a foreigner, was resident at Dresden. In *Short* v. *Campbell*, the affidavit was made by a party who from his situation must necessarily be better acquainted with the fact to which he deposed than the plaintiff himself could be. In the present case, there is nothing whatever to shew that the deponent could by possibility know any thing of the debt.—The first arrest was set aside for irregularity. To entitle the plaintiff again to hold the defendant to bail,

a judge's order was necessary. In *Richards* v. *Stuart*, the second arrest was with the leave of the court: the objection there was, that there was no indorsement of the order of the court for holding the defendant to bail a second time on the back of the writ: but it was held, the case not being the ordinary one of a second arrest under a judge's order, that such indorsement was not necessary under the peculiar circumstances of the case. The conversation with the defendant's attorney, or, as it is called, the undertaking to put in bail, was no waiver of the irregularity, but was only entered into for the purpose of sparing the defendant the disgrace and inconvenience of an actual arrest.

TINDAL, C. J.—With respect to the first point, I must confess myself unable to distinguish this case from that of *King* v. *Lord Turner*, where the question was brought precisely before the court. That case stands clear of the explanation that has been sought to be given to *Pieters* v. *Luytjes* and *Andrioni* v. *Morgan*. The action was for money had and received, and the deponent, without shewing any connection between himself and the plaintiff, so as to make it appear what were his means of knowledge of the fact he was swearing to, deposed positively that the defendant was justly and truly indebted to the plaintiff in a certain sum. Bayley, J., said: "It may be true that it does not appear in what relation this person named Lettice stands to the plaintiff, nor need it, for the deponent would be liable to an indictment for perjury upon this affidavit." The other cases cited as to this point bear out that decision. It is true that the circumstances relied on by my Brother Wilde afford some distinction between the cases in which those circumstances occur and that of *King* v. *Lord Turner:* but I am not prepared to overrule the latter case.—As to the other point, it is unnecessary to lay down any general rule. I am of opinion that the conversation between the two

1837.

HOLLIDAY v. LAWES.

attornies amounted to a waiver of the objection. With full knowledge of all that had taken place, the defendant's attorney consented to give an undertaking on the part of his client to put in bail. It is too late now to say that the plaintiff is not entitled to bail.

PARK, J.—I have always been of opinion, and have at chambers repeatedly acted upon that impression, that it was necessary that an affidavit of debt made by a third party should shew the connection between the deponent and the plaintiff, in order that it might appear that he had some means of knowing the fact to which he swears. But, when I find the opinions of such able judges, and case after case, the other way, I feel myself bound to yield to the authorities, though not prepared to admit the good sense of the rule they establish.—Upon the second point, without holding that a second arrest was justifiable in this case without the leave of the court or a judge, I agree with my Lord Chief Justice that the convention entered into by the defendant's attorney waived the objection.

GASELEE, J.—I have always considered and have invariably acted upon the idea that the affidavit should shew some connection between the deponent and the creditor. The authorities, however, seem to be the other way.—The second point cannot arise after the undertaking given by the defendant's attorney.

VAUGHAN, J.—It would be too much, after the concurrence of the three courts the other way, to hold this affidavit to be insufficient, a conclusion to which I must confess my notion of the practice would otherwise have led me.—The agreement to put in bail was clearly a waiver of the objection to the second arrest.

Rule discharged—the defendant to have four days' time to put in bail.

1837.

Tuesday, Jan. 31st.

Doe *d.* Phillips *v.* Roe.

In ejectment the declaration was by mistake intituled as of Michaelmas Term, 8 Will. 4, instead of 7 Will. 4. The notice was properly dated:—Held, sufficient.

Swann, on a former day, moved for judgment against the casual ejector. The declaration, it appeared, was by mistake intituled as of Michaelmas Term, 8 Will. 4, instead of 7 Will. 4: the notice, however, required the tenant to appear in Hilary Term, 7 Will. 4.

Park, J., the only judge in court, thought at the time that the erroneous date wholly vitiated the declaration: but, having since consulted with the rest of the court, he now, referring to two anonymous cases in Chitty's Reports, in one of which (2 Chit. 173), the declaration being by mistake intituled as of Hilary instead of Michaelmas Term, the notice to appear being correctly dated, the error in the title of the declaration was held to be immaterial, and in the other (2 Chit. 172), the like was held even though there was no date to the notice further than the service of it (*a*), retracted the opinion he had before expressed, and the rule was—

Granted (*b*).

(*a*) In Doe v. Greaves, 2 Chit. 172, the court granted a rule for judgment, where the notice required the tenant to appear in "Trinity," instead of "Hilary" Term next. But, in Lackland d. Dowling v. Badland, 8 Moore, 79, where, in the notice, the tenant was required to appear in eight days of St. Hilary, instead of as of Hilary Term generally, the court held the notice void, and refused to permit judgment to be signed.

In Doe v. Roe, 1 Tyr. 280, 1 C. & J. 330, it was held, that, if the declaration was duly served before the essoin day, the omission in the notice of the term in which the tenant was to appear, was immaterial. But a notice requiring the tenant to appear and defend "in due time," is insufficient—Doe d. Isherwood v. Roe, 2 N. & M. 476, (probably S. C.) Doe d. Forbes v. Roe, 2 Dowl. 420.

(*b*) And see Goodtitle d. Ranger v. Roe, 2 Chit. 172, where the declaration was intituled of Michaelmas Term, 54 Geo. 3, instead of 55 Geo. 3; but, the notice being dated on the 11th January, 1815, requiring the tenant to appear "in next Hilary Term," it was held to be sufficient. And see

1837.

Tuesday, Jan. 31st.

KNIGHT *v.* WOORE and Others.

In trespass for breaking and entering the plaintiff's close, the defendants pleaded, not guilty, that the close was not the close of the plaintiff, and then justified under a right of way for the purpose of carrying goods to and from, and water from a river. The jury by their verdict established the right claimed in the third plea as far as it related to the fetching of water from the river: —Held, that the defendants were substantially the successful party, and therefore entitled to the general costs of the cause, as well as to the costs of the witnesses called in support of the right established by the jury in their favour, notwithstanding those witnesses also spoke to the right claimed in the other part of the same plea, as to the carriage of goods.

THIS was an action of trespass for breaking and entering a close of the plaintiff, and breaking open, breaking to pieces, damaging, and spoiling his gates &c.

The defendants pleaded—first, that the close in the declaration mentioned was not the close of the plaintiff—secondly, a justification under an alleged public right of way over the locus in quo on foot and with horses—thirdly, a justification under an alleged right in the inhabitants of Monmouth to pass on foot and with horses over the locus in quo to the river Wye, for the purpose of carrying and conveying thereover goods by means of horses &c. driven, rode, conducted, guided and led by inhabitants of Monmouth, to be placed and put into barges, ships, boats, and vessels navigating the said river, and of taking water from and out of the said river for the use of the inhabitants, and of receiving goods from and out of the barges, ships, boats, and vessels navigating the said river as aforesaid, and of carrying and conveying the said water so taken out of the said river, and the said goods so received out of the said barges, boats, ships, and vessels navigating the said river as aforesaid, by means of horses, &c., driven, rode, &c., by the said inhabitants—fourthly, not guilty.

The plaintiff joined issue on the first and fourth pleas,

accord. Doe v. Roe, 2 Dowl. 186, Doe d. Gore v. Ross, 3 Dowl. 5, and Doe d. Smithers v. Roe, 4 Dowl. 374. In Goodtitle d. Price v. Badtitle, Ad. Eject. 181, a declaration not intituled of any term, delivered before the essoin day of Hilary Term, with a notice, dated the 1st January, to appear within the first four days of the next term, was held sufficient. And a declaration, delivered in Hilary Vacation, intituled of Easter Term, with a notice to appear on the first day of next term, was held good for an appearance as of Easter Term. Anon. Ad. Eject. 203.

and traversed the right of way claimed in the second and third pleas.

At the trial, a verdict was found for the plaintiff on the first, second, and fourth pleas, and for the defendants on the third so far as related to the right to fetch water. The court afterwards ordered the judgment to be entered up on the third plea distributively—for the plaintiff as to the right to carry goods, and for the defendants as to the right to carry water from the river over the locus in quo—under the rules of Hilary Term, 4 Will. 4, ss. 4, 5, 6: see *Knight* v. *Woore*, 3 New Cases, 3, 3 Scott, 326.

The prothonotary, on taxation, refused to allow the defendants the general costs of the cause; and also disallowed the expenses of those witnesses who spoke to the right to carry goods as well as to the right to fetch water.

Whateley, in Michaelmas Term, obtained a rule calling upon the plaintiff to shew cause why the taxation should not be reviewed.—He submitted that the defendants, having substantially succeeded in their defence, were entitled to the general costs of the cause, subject only to a deduction in respect of those issues upon which the plaintiff had been successful.

R. V. Richards now shewed cause.—The prothonotary has exercised a proper discretion in confining the allowance of costs to the defendants strictly to the half issue which the jury found for them. The plaintiff was compelled to go down to trial for the purpose of resisting the larger right which the defendants sought to establish against him: he therefore is in substance the successful party, and entitled to the general costs. In *Larnder* v. *Dick*, 2 Dowl. 33, 2 C. & M. 389, it was held, that, where some issues are found for the plaintiff and some for the defendant, the latter is entitled (under the rule of Hilary Term 2 Will. 4,

1837.

KNIGHT v. WOORE.

s. 74) to the costs of the issues found for him, but not to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related exclusively to the issues found for him: and, in *Richards* v. *Cohen*, 1 Dowl. 533, that, where the plaintiff succeeds on one of several issues, and the defendant on others, but the defendant's witnesses are as necessary on the issues found against him as on those found for him, the plaintiff is entitled to the costs of all his witnesses upon the issue found for him, and the defendant to none of his.

Whateley, in support of his rule.—The substantial grievance of which the plaintiff complains, is, the breaking and entering his close, and demolishing his gates. The issue found for the defendants shews a complete justification for the trespass: and consequently the defendants have in substance succeeded. *Richards* v. *Cohen* and *Larnder* v. *Dick*, therefore, are wholly beside the present case; for, in both of them, the substantial question was determined in the plaintiff's favour. In *Eades* v. *Everett*, 3 Dowl. 687, it was held that the expenses of a witness called by the defendant, whose evidence was substantially directed towards the issues found for him, were properly allowed to the defendant, although he gave some evidence upon the other issues. The case of *Frankum* v. *Lord Falmouth*, 4 Dowl. 65, is a strong authority in favour of the present defendants. There, in an action on the case, the defendant having succeeded on one of several issues which went to the foundation of the plaintiff's cause of action, he was held to be entitled to the general costs of the cause, although there was a verdict for the plaintiff upon not guilty, without damages. "The fallacy," says Coleridge, J., "on which the argument for the plaintiff is founded, is, the calling the plea of 'not guilty' the general issue. That plea is only a short mode of denying certain facts. Pleas have here been found in favour of the defendant on which

depend the plaintiff's right to the water as it is claimed by him in his declaration. The issues found for the plaintiff are totally unimportant, as he has failed on the others. Upon this record the defendant has succeeded. The jury have found against the plaintiff on one issue on which the plaintiff must rely in order to entitle him to recover. The master's taxation, therefore, allowing the defendant the general costs of the cause, is, in my opinion, correct."

TINDAL, C. J.—It appears to me, on the pleadings, and on the finding of the jury, that the defendants have substantially succeeded in the cause. The substantial issue between the parties has been found in their favour. The plaintiff complains that the defendants broke and entered his close, and broke open, broke to pieces, damaged, and spoiled his gates, &c. The defendants in their third plea set up a right of way over the locus in quo for the purpose of conveying goods and water from the river Wye. When the plaintiff comes to reply, he severs the right set up by the defendants, and makes it in effect two distinct and separate issues—the one as to the right to carry the goods, the other as to the right to carry water. The defendants succeeding on either of those issues, were the party who substantially succeeded, and are entitled to the general costs of the cause. If they have put more upon the record than they can justify, they will be sufficiently punished by the loss of their costs of the excess. Being entitled to the general costs of the cause, there can be no reason why they should be deprived of the expenses of those witnesses who established the defence on the issue found for them, merely because they may have given some evidence also upon the other issue. I think this is exactly the converse of the case of *Richards* v. *Cohen*, where it was held, that, the plaintiff succeeding on one of several issues, and the defendant on others, but the defendant's witnesses being as necessary on the issues found against him as on

1837.

KNIGHT v. WOORE.

those found for him, the plaintiff was entitled to the costs of all his witnesses upon the issue found for him, and the defendant to none of his: because the plaintiff was entitled to the general costs of the cause. Here the parties change positions: the defendants are entitled to the general costs. On the authority, therefore, of that case, as well as of *Frankum* v. *Lord Falmouth*, I think the defendants should have been allowed their costs of the witnesses whose evidence established the right as to the water, as also to the general costs of the cause.

PARK, J.—The difficulty of expounding the new rules is great, and many of those rules impose serious responsibility upon the taxing officers. I think, however, *Richards* v. *Cohen* and *Frankum* v. *Lord Falmouth* are strong authorities in favour of a review of the taxation in this case.

GASELEE, J.—The defendants, having substantially succeeded upon the real question in the cause, were clearly entitled to the general costs, and consequently to the costs of the witnesses called in support of the issue found for them, notwithstanding their evidence also applied to the issue upon which they failed.

VAUGHAN, J.—I am of the same opinion. The whole turns on the question whether the plaintiff or the defendants succeeded on the substantial question at issue in the cause. I think the defendants have in substance been successful.

Rule absolute.

Tuesday, Jan. 31st.

WOODROFFE *v.* WOOTTON and Another.

Costs of proceedings in bankruptcy cannot be set off against damages and costs recovered in an action in this court.

HOGGINS, on a former day, obtained a rule nisi that certain costs due to the defendants on proceedings in

1837.

WOODROFFE v. WOOTTON.

bankruptcy might be set off against the damages and costs recovered against the defendants in this suit.

Barstow shewed cause.—The application is misconceived: it should have been made to the court of bankruptcy, and not to this court. The defendants do not seek the aid of this court to enable them to recover the costs due to them. It is, in effect, a motion for an injunction to restrain the defendants from proceeding in the court of Bankruptcy for the recovery of the costs in question.

Humfrey, in support of his rule, relied on *Webber* v. *Nicholas*, 4 Bing. 16, 12 Moore, 87, where it was held that the costs of a suit in equity might be set off against the costs of an action in this court.

TINDAL, C. J.—That which we are asked to do, is, to stay the proceedings of the defendants in another court over which we have no sort of control. The application should have been addressed to the court in which the costs were incurred that the plaintiff is liable to pay.

The rest of the court concurring—

Rule discharged, without costs.

DUNNAGE *v.* KEMBLE and Others.

Tuesday, Jan. 31*st.*

In trespass for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods, the defendants pleaded—first, not guilty—secondly, an entry to distrain for rent in arrear. A verdict having been found for the plaintiff (with a farthing damages) on the first issue, and for the defendant on the second:—Held, that the plaintiff was not entitled to costs, in the absence of a certificate, under the 22 & 23 Car. 2, c. 9, that the freehold was chiefly in question.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiff, breaking open the doors, damaging and spoiling the locks, and seizing and taking his goods.

1837.

DUNNAGE v. KEMBLE.

The defendants pleaded—first, not guilty—secondly, except as to breaking open the doors and damaging the locks, that the plaintiff, for eighty-four weeks next before the time when &c., held the house in which &c. as tenant to the defendant Kemble, under a demise at a weekly rent of 4*s.* 6*d.*, and, the rent for eighty-four weeks being in arrear, the defendants entered the house, the outer door being open, to distrain, and did distrain the plaintiff's goods for the rent so in arrear.

The plaintiff joined issue on the first plea, and replied to the second, that the outer door was not open, and that the defendants, of their own wrong, and without the cause by them alleged, committed the trespasses in the declaration mentioned, except as in the introductory part of the second plea was excepted.

At the trial before Vaughan, J., at the Sittings at Westminster after the last Easter Term, a verdict was found for the plaintiff on the first issue, damages one farthing, and for the defendant on the second issue. The prothonotary declining to tax the plaintiff his costs—

Andrews, Serjeant, in Trinity Term last, obtained a rule calling upon the defendants to shew cause why the plaintiff's costs should not be taxed.—The statute 22 & 23 Car 2, c. 9, enacts, "that, in all actions of *trespass*, assault and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto." In *Hughes* v. *Hughes*, 1 Tr. & G. 4, 2 C. M. & R. 663, 4 Dowl. 532, where the plaintiff recovered thirteen shillings damages in an action of tres-

pass quare clausum fregit, to which only the general issue was pleaded, it was held that he was entitled to his full costs, as, under that plea, as restricted by the rules of pleading of Hilary Term, 4 Will. 4, the freehold could not come in question. And that case was confirmed by the court of King's Bench in *Smith* v. *Edwards*, 4 Dowl. 621. Here, the freehold could not come in question; for, by the new rules, the plea of not guilty in trespass quare clausum fregit operates only as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possion of that place, which, if intended to be denied, must be traversed specially; and the title to the freehold was clearly not involved in the second issue.

Talfourd, Serjeant, in Michaelmas Term, shewed cause. The statute 22 & 23 Car. 2, c. 9, applies only where it appears upon the face of the record that the title to the freehold might come in question, and the judge had the power to certify. *Hughes* v. *Hughes* and *Smith* v. *Edwards* proceeded upon a fallacy: the ground of the decision in each of those cases was, that in no case, since the new rules, could the freehold come in question under the general issue. The court cannot look out of the record to see whether or not the freehold could come in question. So far, indeed, has this principle been carried, that, in *Stead* v. *Gamble*, 7 East, 325, 3 Smith, 248, where, to trespass at A., and throwing down, burning, and totally destroying the plaintiff's hedge there then erected &c., whereby &c., the defendant pleaded the general issue, and justified as to the throwing down the hedge, because it was erected on a common, over which he had prescribed for right of common, and issue was taken on such right, which was found for him, and a verdict found for the plaintiff with twenty shillings damages on the general issue; it was held that the facts stated in the special plea

1837.

DUNNAGE v. KEMBLE.

and found, could not be taken into consideration to shew that the title to the freehold could not come into question on the declaration; and as, on the declaration, the freehold *might* have come in issue, and the judge did not certify, the plaintiff was entitled to no more costs than damages. In the present case, it does not appear that the freehold might not come in question: for, notwithstanding the rule of Hilary Term, 4 Will. 4, there are many cases in which, under the plea of not guilty in trespass, the freehold may still come in question; as, in actions against justices, commissioners of bankrupts, surveyors of highways, &c., and in various other cases that may be conceived, where the defendants are by various acts of parliament allowed to plead the general issue, and give the special matter in evidence, and where the freehold may come in question; or, which is more particularly applicable to this case, under the statute 11 Geo. 2, c. 19, s. 21, which provides, "that, in all actions of trespass, or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence." The defendant in this case might have set up, under the general issue, a distress under that statute. It was therefore open to him to put the freehold in question: and, unless the court can say that this is a case in which the freehold *could not* come in question, the plaintiff is not entitled to costs.

Bompas and *Andrews*, Serjeants, in support of the rule. *Hughes* v. *Hughes*, *Smith* v. *Edwards* (which was stated

by Mr. Justice Patteson, in a case of *Hewett* v. *Bartlett*, at the last Exeter Assizes, to have been decided by the whole court of King's Bench, after mature consideration), and *Bone* v. *Dawe*, 5 N. & M. 230, 3 Ad. & E. 711, where, in trespass for assault and false imprisonment and tearing the plaintiff's clothes, upon an issue on a new assignment to a plea of son assault demesne, the jury found a verdict for the plaintiff with one shilling damages, and the plaintiff had costs, are decisive of the question. [*Bosanquet*, J. These cases were determined with reference to the rule of Hilary Term, 4 Will. 4: that rule does not apply to a case where the general issue is given by statute.] Under the 11 Geo. 2, c. 19, undoubtedly, the freehold *might* come in question upon the general issue: but that is not this case. On the face of this record, it does not appear that the freehold *could* come in question: and therefore, notwithstanding the absence of a certificate under the 22 & 23 Car. 2, c. 9, the plaintiff is entitled to his costs.

TINDAL, C. J.—The line of argument urged on the part of the defendants in this case does not seem to have suggested itself or to have been considered in those upon which the plaintiff relies. As it is a question of importance, we will take time to consider, and will give directions to the prothonotary on the subject.

Cur. adv. vult.

The following certificate was afterwards sent to the prothonotary:—

"The Court have considered this case, and are of opinion that the plaintiff is not entitled to costs, without a certificate under the 22 & 23 Car. 2, c. 9; and therefore the rule for directing the prothonotary to tax his costs must be discharged, but without costs."

Rule discharged, without costs.

1837.

Tuesday, Jan. 31st.

Where in ejectment the consent rule has been made the means of committing a fraud upon the court, a party being thereby admitted as defendant who is a pauper and has no real interest in the premises, the court will interpose.

A motion for this purpose may be made, notwithstanding the proceedings have been stayed by a judge's order until delivery by the lessors of the plaintiff of a particular of the breaches of covenant for which the action is brought.

DOE *d.* CARR and Others *v.* MARY JORDAN.

THIS was an action of ejectment brought to recover the possession of certain premises, a right of re-entry to which was alleged to have accrued to the lessors of the plaintiff by reason of a forfeiture for non-repair pursuant to covenants in an indenture of lease.

Wilde, Serjeant, on a former day, obtained a rule calling upon one Flight to shew cause why he should not be made a party to the consent rule entered into by Mary Jordan, or why, in default thereof, the lessors of the plaintiff should not be at liberty to issue execution against the casual ejector, or why Mary Jordan should not give security for costs.—The motion was founded upon affidavits which stated, that, by indenture of lease, dated the 7th June, 1822, the premises in question were demised by the lessors of the plaintiff to one Palmer for twenty-one years; that, after the death of Palmer, his administratrix caused his interest in the residue of the term to be put up for sale by auction; that the deponent (the attorney for the lessors of the plaintiff) was informed and believed that one Thodey attended the sale, and purchased the lease for 80*l.*, in the name of Mary Jordan, and that Thodey was at the time clerk to Flight, and Mary Jordan a pauper, and that Thodey in fact purchased the lease as the agent and with the money of Flight, and for his benefit, and not, as pretended, for Mary Jordan, and that Mary Jordan was put forward to prevent the liability of Flight upon the covenants contained in the lease; that application had been made by the deponent to Flight's attorney for the address of Mary Jordan, but that gentleman refused to give her address or any information whatever concerning her; that, in consequence of such refusal, the deponent took out a

summons calling upon Flight's attorney to shew cause why he should not deliver in writing the defendant's address; that, upon attending one of the judges, his lordship declined to interfere or make any order between the parties; that the deponent had on several occasions made particular inquiries of several of the tenants in possession of part of the premises relative to any knowledge they might have of Mary Jordan, and deponent had been thereupon informed that the rents had been invariably collected by persons who represented themselves to be the clerks or agents of Flight, and that they (the tenants) had on several occasions made inquiries at the time of paying their rents who Mary Jordan was, but such clerks or agents were unable or declined to inform them who she was, where she lived, or anything about her; that particularly on the 13th July and 2nd April, 1836, one Cartwright, a clerk of Flight, received rent of one Cordingley, one of the tenants in possession of part of the premises, describing it in the receipts as received "for Thomas Flight;" that the deponent was also informed by Cordingley, that, the lease under which he held the premises from Palmer having expired, he wished to treat for a renewal, and, upon making inquiries of the agents or clerks of Flight, he was referred to Flight's attorney, with whom he treated for a renewal; that Flight's attorney had appeared to this action and entered into the usual consent rule as the attorney for Mary Jordan, but the deponent verily believed that Flight had instructed him to appear and defend the action for his benefit, and had appeared in the name of Mary Jordan for the purpose of preventing the responsibility of Flight for the costs. The clerk to the attornies employed by Palmer's administratrix, also swore, that, after the execution of the assignment to Mary Jordan, the deponent was directed by his employers to call upon her in Green-street, Leicester-square, her address having been so inserted in the assignment by the direction

1837.

DOE d. CARR v. JORDAN.

of Flight's attorney, for the purpose of serving her with a notice to pay the rent under the assignment to the lessors of the plaintiff; that he accordingly went to that place, but, notwithstanding the most minute and diligent inquiries, was unable to discover that Mary Jordan had ever resided in or near Green-street, Leicester-square, and deponent verily believed that Flight's attorney well knew the address given to be fictitious: that, being unable to discover Mary Jordan, the deponent applied to Flight's attorney for further information as to her address, when he was informed by that gentleman that he knew nothing of Mary Jordan, that the first time he had ever seen her was at the office of his (the deponent's) employers, executing the assignment, and that the notice to pay the rent to the superior landlords had better be given to Flight; that, upon application being made to Flight for information as to the number of the house in Green Street in which Mary Jordon resided, he refused to give any information, and referred the deponent to his attorney.

Bompas, Serjeant, and *Hoggins*, before shewing cause, objected that the motion was irregular, the hands of the lessors of the plaintiff being tied up by an order of Mr. Justice Vaughan, directing "that the attorney of the lessors of the plaintiff should deliver to the attorney for the defendant a particular in writing of the breach or breaches of covenant or covenants complained of; and, in case the breach or breaches complained of should be of a covenant or covenants to repair the premises in question, then a particular of the repairs required; and that, in the meantime, *all proceedings should be stayed;*" which order had not been complied with.

Wilde, Serjeant, and *James*, contrà.—A stay of proceedings does not prevent the party from coming to the

court to make a collateral application, an application to its discretion, and one that over-rides the order. [*Vaughan*, J.—Does not the order tie up the hands of the lessors of the plaintiff?] The object of this motion is, not to discharge the order, which in itself is unexceptionable; nor is it a step in the cause: it is an objection taken to a proceeding anterior to the order.

1837.

Doe d. Carr v. Jordan.

Tindal, C. J.—I think this is an excepted case. It is not within the mischief pointed at by the rule. The lessors of the plaintiff are not seeking, in defiance of the judge's order, to take a step in the cause. We must hear the argument on the merits.

The rest of the court concurring—

Bompas, Serjeant, and *Hoggins*, proceeded to shew cause, upon the affidavits of Flight and his attorney; the former of whom deposed, that he had been many years acquainted with Mary Jordan; that he had in his hands a small sum of money belonging to her, on which he allowed her interest, and, having an authority from her for that purpose, he, with a view to increase her income, and as a beneficial investment for her, directed his clerk, Thodey, to bid for the premises for Mary Jordan; that, she becoming the purchaser thereof for 42*l.*, he placed the business in the hands of his attorney for completion on her behalf, and furnished him for that purpose with her then residence in Green-street, Leicester-square; that such address was not fictitious, but that Mary Jordan resided and had resided there for many years; that the assignment was executed to Mary Jordan bonâ fide, and not to the deponent; that, although the deponent had always managed the property, yet such management had been for the benefit of Mary Jordan, and not for his own benefit; that Mary

Flight's affidavit.

1837.

DOE d. CARR v. JORDAN.

Jordan had not made to the deponent any declaration in writing or otherwise that she was merely a trustee of the premises for him, nor was she a trustee of the same for him; that the deponent was a very considerable holder of house property, and kept several collectors and clerks for the purpose of the collection and management of the rents and other business connected therewith; that receipts ready printed, with deponent's name printed thereon—"For Thomas Flight"—intended for his collectors or clerks to sign their names thereunder, were kept ready, and on all occasions used, and that deponent's collector, having collected the said rents, used the receipts of the deponent, but the same were nevertheless collected and received for Mary Jordan as the legal owner and proprietor of the premises. Flight's attorney deposed, that, on the occasion of the purchase of the premises of the administratrix of Palmer, he was employed by Flight to complete the purchase for Mary Jordan; that the contract of sale was signed "Edward Thodey, for Mary Jordan;" that deponent prepared an assignment of the premises to the defendant, and for that purpose obtained from Flight the residence of Mary Jordan, in Green-street, Leicester-square, which description was accordingly inserted in the assignment, and the assignment, after being approved by the solicitors for the vendor, was executed by her and by Mary Jordan; and that the deponent did not know, or had the least reason to suspect, nor did he then believe or suspect that such address was a fictitious address, or not the place in which the defendant then resided.

Affidavit of Flight's attorney.

No instance is to be found of a stranger to the record being called upon by a rule of court to give a particular of the defendant's residence (*a*). [*Tindal*, C. J.—This is not

(*a*) In Taylor v. Harris, 4 B. & A. 93, where the defendant in assumpsit having pleaded in abatement that four others were jointly liable with himself, the plaintiff applied to the defendant's attor-

1837.

DOE d. CARR v. JORDAN.

like calling upon a party in an ordinary case to disclose the place of the defendant's residence. Mary Jordan has been let in under the common consent rule to defend as landlady. We must see that the court is not imposed on, and that she is a real party.] She is not called upon at all: the rule only calls upon Flight. The fact of the same attorney acting for both those individuals makes no difference. Before applying for leave to issue execution against the casual ejector, the lessors of the plaintiff should have sought to set aside the rule substituting her as defendant instead of the casual ejector.

Wilde, Serjeant, and *James*, in support of the rule.—It is sworn, and not denied, that Mary Jordan is a pauper; and the facts detailed in the affidavits upon which the rule was obtained, point irresistibly to the conclusion that the insertion of her name as defendant in the consent rule was a fraud upon the court. In *Thrustout* d. *Jones* v. *Shenton*, 10 B. & C. 110, where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pauper) should abide the event of the ejectment against the other, and that action was tried, and the lessor of the plaintiff obtained judgment and took possession of all the tenements, the court compelled the landlord to pay the costs of that ejectment. In *Thrustout* d. *Jones* v. *Nixon*,

ney to give the places of residence and additions of those persons, which he refused unless the action were discontinued; the court of King's Bench made a rule absolute for the defendant to deliver such particulars, or, in default thereof, for setting aside the plea. So, in Newton v. Verbeke, 1 Younge & Jerv. 257, where several persons unknown to the plaintiff were named in a plea in abatement, the court of Exchequer ordered the defendant to furnish particulars in writing of the places of residence and additions of the persons named, and held, that, for a non-compliance with such order, they would quash the plea.

1837.

DOE d. CARR v. JORDAN.

10 B. & C. 112, several ejectments were brought against several tenants, each holding different premises of the same landlord, and, upon an application to set aside the appearance, plea, &c., in one of the actions, and for leave for the landlord to appear and defend for all the ejectments, it was ordered that the landlord should appear within a fortnight, and defend as landlord in all the ejectments, and that, in default thereof, judgment might be signed against the casual ejector. And in *Doe* d. *Masters* v. *Gray*, 10 B. & C. 615, it was held, that, in ejectment, the court will compel the real defendant to pay the costs, *although he is not a party on the record.* These cases shew that the proceedings in an action of ejectment, which is the creature of the court, may always be so moulded as to do substantial justice. [*Vaughan*, J.—Why does not the rule call upon Mary Jordan?] The sole object of the motion was, to compel Flight, the party really interested, to come forward and take upon himself the responsibility which he seeks to evade by setting up an unknown pauper to defeat the ends of justice.

TINDAL, C. J.—I entertain not the slightest doubt as to the power and authority of the court to interpose where it is made to appear that the consent rule has been the means of committing a fraud. The question here, however, is, whether, after the answer that has been given by Flight, we can see with sufficient certainty that he is, as is suggested, the party really interested. The gist of the motion is that the purchase and assignment from the administratrix of Palmer, the lessee of the premises, though nominally made for the benefit of Mary Jordan, was in point of fact solely for the benefit of Flight, her name being used for the mere purpose of palming a pauper upon the lessors of the plaintiff. Flight, in his affidavit in answer, swears that the property in question was purchased

for Mary Jordan; that the assignment was executed to her bonâ fide; and that, although he had always managed the property, yet such management had been for the benefit of Mary Jordan, and not for his own benefit. After this positive and complete answer, I think we should not be warranted in interfering.

PARK, J.—I must confess I am by no means satisfied with Flight's answer to the motion: his affidavit is full of inconsistencies. My suspicions were roused at the outset by the fanciful objection so vehemently urged by his counsel. I think the matter should undergo investigation before one of the prothonotaries.

VAUGHAN, J.—I agree with my Brother Park that a further investigation of this most suspicious case would be desirable. The rule is somewhat extraordinary in its prayer: it calls upon Flight, a person not before the court, to shew cause why he should not be made a party to the consent rule, or why, in default thereof, the lessors of the plaintiff should not be at liberty to issue execution against the casual ejector; and it also calls upon Flight to shew cause why Mary Jordan should not give security for costs (*b*). It is admitted that Mary Jordan has never been served with the rule: and yet we are called upon to make it absolute against a party who has had no opportunity of being

(*b*) Where the *lessor of the plaintiff* is unknown to the defendant, the latter may call for an account of his residence or place of abode from the plaintiff's attorney; and, if he refuse to give it, or give in a fictitious account of a person who cannot be found, the courts will stay the proceedings until security be given for the payment of costs. But the poverty of the lessor of the plaintiff, a known individual, is no ground for an application for security. There is no case to be found in the books, where security for costs has been required to be given by a defendant, either in ejectment or in any other form of action.

1837.

DOE *d.* CARR *v.* JORDAN.

heard. The case is undoubtedly one of great suspicion. Flight makes an affidavit without a single date or circumstance of explanation. Still, he has positively sworn (and he is the last swearer) to facts which I feel oblige me to say that this rule cannot be made absolute. But I think he ought not to have costs.

Rule discharged, without costs.

END OF HILARY TERM.

IN THE COMMON PLEAS.

EASTER TERM, 7 WILL. IV.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE TINDAL, C. J., PARK, J., BOSANQUET, J., AND COLTMAN, J.

MEMORANDA.

1837.

MEMORANDA.

ON the 24th February last, Thomas Coltman, of Lincoln's Inn, Esq., one of his majesty's counsel learned in the law, was called to the degree of the coif. He gave rings with the motto—"Jus suum cuique." The learned gentleman at the same time was appointed one of the Judges of the Court of Common Pleas, on the resignation of Sir Stephen Gaselee; and he shortly afterwards received the honour of knighthood.

On the first day of Easter Term, Sir Thomas Coltman took his seat on the bench, the usual oaths being first administered to him in court by one of the Secondaries.

The following gentlemen, who had been appointed of his majesty's counsel learned in the law, on the same day, took their seats within the bar:—Francis James Newman Rogers, of the Inner Temple, Esq., Biggs Andrews, of the Middle Temple, Esq., George Chilton, of the Inner Temple, Esq., John Evans, of the Inner Temple, Esq., Richard Budden Crowder, of Lincoln's Inn, Esq., Francis Whit-

1837.

MEMORANDA.

marsh, of Gray's Inn, Esq., and Charles Purton Cooper of Lincoln's Inn, Esq.

John Jervis, of the Middle Temple, Esq., was also called within the bar, he having received a patent of precedence authorizing him to take rank before Francis Whitmarsh, Esq., and Charles Purton Cooper, Esq.

Saturday, April 15th.

In trover for goods, the defendant was allowed to plead —first, not guilty—secondly, that the plaintiffs were not lawfully possessed of the goods—and two other pleas alleging a deposit of the goods in question in the hands of the defendant as a security for a bill discounted by a third person.

JAULERRY and Others *v.* BRITTON.

TROVER against a wharfinger, for goods. Pleas—first, not guilty—secondly, that the plaintiffs were not lawfully possessed of the goods—and two pleas alleging a deposit of the goods in question in the hands of the defendant as security for a bill discounted by a third person. Gurney, B., struck out the two last-mentioned pleas, on the ground that the defence thereby set up was covered by the first and second pleas.

Hoggins now moved that the third and fourth pleas might be restored.

W. H. Watson shewed cause in the first instance.—A lien may be given in evidence under not guilty; for, if the defendant has a right of lien, he cannot have been guilty of a wrongful conversion. [*Tindal*, C. J.—Why should we drive the defendant to rely upon a doubtful point?] The third and fourth pleas do not in fact set up a lien for a debt due to the defendant; but they attempt to set up as a bar to the action a right to hold the goods as a security for a debt alleged to be due to a third person: they are clearly no answer to the action. [*Per Curiam.*—The question is not whether the pleas are good or bad.] They are not, as it is assumed, pleas under the factors' act, 6 Geo. 4, c. 94.

1837.

JAULERRY v. BRITTON.

TINDAL, C. J.—It would be too much, on a motion like this, to enter into a nice discussion upon the factors' act. If the pleas are bad, the plaintiff will, if so advised, demur to them. On payment of costs, I think the rule must be made absolute.

VAUGHAN, J.—It is enough to say that this is not a palpable evasion of the new rules.

The rest of the court concurring—

Rule absolute.

WRENCH, Clerk, *v.* LORD and Others.

Tuesday, April 18th.

Quære whether churchwardens and overseers have power to mortgage lands devised to the parish for the repair of the church, to reimburse the rector for sums expended by him in such repairs at the request of the inhabitants.

At a vestry meeting the following resolution was agreed to, and signed by the churchwardens and overseers for the time being, and stamped with a 20*s.* stamp:—"The undersigned consent to the liquidation of the debt due to Dr. Wrench, amounting to 53*l.* 7*s.*; to be charged upon the income of the church land; 8*l.* 8*s.* to be collected by a church-rate; amounting in the whole to 61*l.* 15*s.*: such money so to be paid from the rents of the church land, after discharging the bills outstanding and such repairs of the church as may be ordered by the archdeacon for the time being during the progress of the above-mentioned liquidation:"—Held, that this entry, if operative at all, could only operate as a charge upon the land, and therefore a 20*s.* stamp was not sufficient to render it admissible in evidence.

THIS was an action of assumpsit for money had and received, brought by the plaintiff, the rector of a parish at Maidstone, in Kent, against the churchwardens and overseers of the same parish.

At the trial before Tindal, C. J., at the last Assizes at Maidstone, the following facts appeared in evidence:—The plaintiff having, at the request of the inhabitants of his parish, expended money in the repair of the church, it was agreed at a meeting of the vestry that he should be reimbursed out of the rents of land that had many years ago been devised to the parish for the repairing of the church. The following entry of the resolution was made in the vestry-book, and signed by the churchwardens and overseers for the time being, and stamped with a 20*s.* stamp.

"The undersigned consent to the liquidation of the

1837.

WRENCH v. LORD.

debt due to Dr. Wrench, amounting to *53l.* 7*s.*; to be charged upon the income of the church land; 8*l.* 8*s.* to be collected by a church rate; amounting in the whole to 61*l.* 15*s.*: such money so to be paid from the rents of the church land, after discharging the bills outstanding and such repairs of the church as may be ordered by the archdeacon for the time being during the progress of the abovementioned liquidation."

On the part of the defendants, it was objected that the churchwardens and overseers, in whom the property was vested, had no power, under the statute 59 Geo. 3, c. 12, to mortgage it; that, if they had such power, the entry in the vestry-book was not a valid exercise of it; that it was made to cover advances already made; and that it was not receivable in evidence without a proper mortgage stamp.

His lordship thereupon nonsuited the plaintiff.

Wilde, Serjeant, now moved to set aside the nonsuit, and for a new trial.—He submitted that there was nothing in the statute to restrain the churchwardens and overseers from entering into such an engagement as this, which it was competent to them to do without the consent of the vestry; and that it was immaterial whether the charge was made for the liquidation of a debt already contracted, or to cover repairs to be done: and he cited *Doe* d. *Jackson* v. *Hiley*, 10 B. & C. 885, where it was held that the statute 59 Geo. 3, c. 12, s. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied; and that although such buildings &c. had originally been vested in trustees for the benefit of the parish.

TINDAL, C. J.—This motion has applied itself only to one of the objections upon which the nonsuit proceeded,

1837.

WRENCH v. LORD.

viz., that the churchwardens and overseers had no right to mortgage lands devised to the parish for the repair of the parish church. It appears to me to be unnecessary on this occasion to enter into any discussion upon that very serious question: for, the first objection taken at the trial—that the entry in the vestry-book, if anything, amounted to a charge upon the land, and therefore a 20*s.* stamp was not sufficient to render it admissible in evidence—cannot I think be got over. I was of opinion at the trial, and I still think, that, if the churchwardens and overseers had any power to charge lands under circumstances like the present, the entry in the vestry-book did not in point of fact amount to a charge upon the land. To constitute a mortgage, there should have been a regular conveyance under seal by the churchwardens and overseers. The entry in question is in fact no more than a consent, signed by the churchwardens and overseers for the time being on behalf of the parishioners in vestry assembled, which their successors would not be bound to take notice of. The want of a proper stamp is a fatal objection.

VAUGHAN, J.—I am of the same opinion. The churchwardens and overseers clearly could not charge the land by an entry like this.

BOSANQUET, J.—The document was clearly not receivable in evidence as a charge upon the land without a proper mortgage stamp.

COLTMAN, J.—The defendants were only charged as having received the rents in question as bailiffs of Dr. Wrench. The entry in the vestry-book can have no operation as a conveyance; and therefore they cannot be said to have received the rents on his account.

Rule refused.

1837.

Tuesday, April 18th.

An affidavit to hold to bail alleged that the defendant was indebted to the plaintiff in a certain sum "on the balance of an account stated between them:" —Held, sufficient.

TYLER *v.* CAMPBELL.

THE defendant was held to bail upon an affidavit in which it was sworn that he was indebted to the plaintiff in the sum of 800*l.* "on the balance of an account stated between them."

Barstow now moved that the bail-bond might be delivered up to be cancelled, on the defendant entering a common appearance, on the ground that the above affidavit was insufficient.—In *Visger* v. *Delegal*, 2 B. & Ad. 571, 5 Dowl. 333, an affidavit stating that the defendant was indebted to the plaintiff in 1000*l.* "on balance of an account for money paid, laid out, and expended by the plaintiff *to and* for the defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of monies due by the defendant to the plaintiff," was held not to be sufficiently certain, by reason of the unnecessary insertion of the words in italic. And Lord Tenterden said: "There are certain forms of affidavits to hold to bail in common use, and generally known and understood. The safest course is, that individuals should conform to these, and not depart from them, and then call upon the court for such a construction as may remedy the fault." The form given in Tidd's Appendix to the 9th edition of the Practice, p. 78, is— "upon the balance of an account stated *and settled* by and between the plaintiff and defendant." Here, the affidavit might be literally true, and yet the defendant might not be indebted at all; for, though the defendant might have stated the account with the plaintiff, his liability to pay the balance might at the time have been disputed.

TINDAL, C. J.—It appears to me, that, inasmuch as the common form of a count upon an account stated given by

1837.

TYLER v. CAMPBELL.

the rules of Trinity Term, 1 Will. 4, merely contains an allegation that the defendant is indebted to the plaintiff in so much "for money found to be due from the defendant to the plaintiff on an account then and there stated between them," and the affidavit now before us uses precisely the same words, nothing more can be required.

VAUGHAN, J.—That which is a sufficient allegation in a count must surely be sufficient for an affidavit to hold to bail.

The rest of the court concurring—

Rule refused.

ERNEST *v.* BROWN.

Tuesday, April 18th.

In debt for work and labour and goods sold and delivered, the plaintiff by his particular claimed 5*l.* for goods sold, admitting the receipt of 1*l.* 13*s.* on account. The defendant pleaded nunquam indebitatus to the whole declaration, and as to all but 3*l.* 7*s.*, part of the sum demanded in the second count, nunquam indebitatus, bringing that sum into court. At the trial the plaintiff failed to establish his demand for work and labour:—Held, that he was nevertheless entitled to a verdict for nominal damages; the admission of the receipt of 1*l.* 13*s.* in the particular merely amounting to evidence of the payment of that sum.

THIS was an action for work and labour done by the plaintiff for the defendant and money expended about the same, goods sold and delivered, and money due upon an account stated. The defendant pleaded, as to the whole of the declaration, nunquam indebitatus, and as to all but 3*l.* 7*s.*, part of the sum demanded in the second count, nunquam indebitatus, bringing that sum into court.

At the trial before Tindal, C. J., at the Sittings at Westminster after the last term, the evidence failed to establish the first count of the declaration; and upon the second count the plaintiff claimed 5*l.*, the price of a cart alleged to have been sold and delivered by him to the defendant. In his particular of demand the plaintiff gave credit for a sum of 1*l.* 13*s.* received on account. It was thereupon submitted on the part of the defendant that he was entitled to a verdict, there being no necessity for pleading payment of the 1*l.* 13*s.*, inasmuch as its receipt was admitted by the particular. His lordship, however, thought that the plaintiff was under the circumstances entitled to a verdict for nominal damages. A verdict having

1837.

ERNEST v. BROWN.

been found for the defendant upon the first and third counts, and for the plaintiff on the second—

R. Alexander now moved that it might be set aside, and a verdict entered for the defendant.—It is true that payment cannot be given in evidence in bar of the action, unless pleaded. But, where a part of the original debt is by the particular admitted to have been paid, there can be no reason why the record should be burthened by a reiteration of the fact in the shape of a plea. [*Tindal*, C. J.—That might have been so under the old form of pleading the general issue.] In *Coates* v. *Stevens*, 2 C. M. & R. 118, where it appeared by the particular of demand that the action was brought for 30*l.*, the balance of an account of 40*l.*, Parke, B., said; "You had no necessity to plead the payment of the sum of 10*l.*, as that was admitted by the particulars." [*Tindal*, C. J.—That was an action of assumpsit: here the issue is whether the defendant was *ever* indebted beyond the 3*l.* 7*s.* The plaintiff is forced down to try an issue which he probably never would have tried had the defendant pleaded the payment.] It would surely be a work of supererogation to plead payment of that which the plaintiff by his particular himself says forms no part of his demand.

TINDAL, C. J.—I do not see my way with sufficient clearness to induce me to grant this rule. Giving the admission on the face of the particular its fullest effect, it amounts to no more than evidence of payment of 1*l.* 13*s.* It is no bar to the action.

BOSANQUET, J.—The two sides of the account constitute mutual debts. The 1*l.* 13*s.* was once due.

The rest of the court concurring—

Rule refused (*a*).

(*a*) See Kenyon v. Wakes, 2 Meeson & Welsby, Trinity Term, 7 Will. 4, (not yet published). That was an action of assumpsit for wages. The defendant pleaded non assumpsit. The particulars of demand stated a claim for wages at 15*s.* per week, amounting altogether to 148*l.*, and gave credit for payments on account to

1837.

Tuesday, April 18th.

BOWMAN *v.* WILLIS.

The defendant took, as legatee of one W., a horse that had been for some time prior to his decease in W.'s possession, and sold him. The plaintiff, the original owner of the horse, alleging that it had never been sold to W., brought assumpsit for the price:—Held, that the executor and residuary legatee of W. was a competent witness for the plaintiff, to prove admissions by W. in his lifetime that the horse was the plaintiff's property, and with him only on trial.

THIS was an action of assumpsit for money had and received. The defendant pleaded non assumpsit.

At the trial before Tindal, C. J., at the Sittings at Westminster after the last term, the facts that appeared in evidence were as follow:—Dr. Willis, the father of the defendant, died on the 28th September, 1833. By his will he bequeathed to the defendant, amongst other things, all his horses, and he appointed one Curtis his executor and residuary legatee. Under the bequest to him, the defendant took a horse that had been for some time prior to his decease in the possession of the testator, and sold him. The plaintiff, the original owner of the horse, alleging that it had never been sold to the testator, brought assumpsit for the price:—Held, that the executor and residuary legatee of the testator was a competent witness for the plaintiff, to prove admissions by the testator in his lifetime that the horse was the plaintiff's property, and with him only on trial.

the amount of 70*l.* At the trial the defendant put the particulars in evidence as shewing a payment of 70*l.*, and the jury, having found that the plaintiff was only entitled to wages at the rate of 7*s.* per week (which destroyed the balance of 78*l.* claimed by the plaintiff), gave a verdict for the defendant. The court of Exchequer held that the particulars were properly received as an admission of the payment, and, it not having been objected at the trial that they could only be used in reduction of damages, and not in bar of the action, that the verdict ought not to be disturbed. Parke, B., there says: "I think this rule ought to be discharged, because the objection that the plaintiff was at all events entitled to nominal damages, was not taken at the trial. Had that point been raised, we should have had to consider a question which must soon be determined, viz. whether a payment admitted by the particulars must be pleaded. Had it not been for the decision of the court of Common Pleas in Ernest v. Brown, I should have had little or no doubt upon the subject. Before that case, I entertained a strong opinion, and so expressed it in Coates v. Stevens, 2 C. M. & R. 118, that such a payment need not be pleaded. I thought that the particulars were given to the defendant to enable him to know how to plead, as well as to restrain the plaintiff's proof of the claim in his declaration. In that view I agree with the decision of Patteson, J., in Booth v. Howard, 5 Dowl. 438, that the particulars are for the benefit of the defendant. It is said that in Ernest v. Brown a distinction was taken between debt and assumpsit with reference to this point. I cannot understand that distinction; nor am I at present satisfied that my first impression on this point, which I expressed in Coates v. Stevens, was wrong." And see Nicholl v. Williams, 2 M. & W. 758.

1837.

BOWMAN v. WILLIS.

dant took possession of a horse which had been in the doctor's stables for seventeen months prior to his decease, sold him at Tattersall's, and received the proceeds, 102*l.* 16*s.* 6*d.* On the part of the plaintiff, it was insisted that this horse was not the property of Dr. Willis, but that that gentleman had only had him on trial. To substantiate his case, the plaintiff called Curtis to prove declarations made to him by Dr. Willis in his lifetime, to the effect that the horse was the plaintiff's, that he (the Doctor) only had him on trial, and that he did not know whether he should buy him or not. For the defendant, it was objected that the testimony of Curtis was inadmissible, he having a direct and immediate interest in the event of the suit. His lordship allowed the witness to be examined: and a verdict was found for the plaintiff—102*l.* 16*s.* 6*d.*

Talfourd, Serjeant, now moved for a new trial, on the ground that Curtis's evidence had been improperly received.—Curtis had a direct and immediate interest in the event of the suit: for, a verdict for the plaintiff would discharge the estate he represented from a liability that otherwise might attach to it, and consequently by so much diminish the residue in which he was interested. The case, therefore, clearly falls within the rule laid down by Buller, J., in *Bent* v. *Baker*, 3 T. R. 27, and by Lord Kenyon in *Smith* v. *Prager*, 7 T. R. 62—"No objection can be made to the competency of a witness upon the ground of interest, unless he be *directly interested in the event of the suit*, or can avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." [*Bosanquet*, J.—To render the objection available, the interest of the witness must be certain, and capable of being enforced independently of the 3 & 4 Will. 4, c. 42, ss. 26, 27.] It is not simply as such that the witness could upon any future occasion avail himself of the verdict and judgment in this action, but rather as a discharge or satisfaction of a demand to which the

1837.

BOWMAN v. WILLIS.

estate of the testator would otherwise be liable. If the testimony of Curtis were expunged, evidence would remain whence the jury might have inferred a sale to Dr. Willis. The question in reality was between the witness and the defendant; by aiding the plaintiff in making out a case against the defendant, the witness was relieving from liability the residue in which he was interested: he had therefore a direct and immediate interest in the event of the suit, and the statute does not apply—*The Bailiffs of Godmanchester* v. *Phillips*, 6 N. & M. 211.

TINDAL, C. J.—The statute 3 & 4 Will. 4, c. 42, s. 26, in order to render the rejection of witnesses on the ground of interest less frequent, enacts, "that, if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him." And the 27th section directs, "that the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence." I think this case falls precisely within the terms of the

1837.

BOWMAN v. WILLIS.

statute. The contention on the part of the plaintiff was, that he never sold the horse to Dr. Willis. No immediate benefit could result to the witness from the termination of the suit the one way or the other. It is only upon the supposition of a second action brought against the witness as executor for the price of the horse, and that the recovery in this action would be his defence, that he could be said to be interested. The language of the statute is, "that, if any witness shall be objected to as incompetent," not on the ground of an immediate interest in the event of the suit, but "*on the ground that the verdict or judgment in the action in which it shall be proposed to examine him would be admissible in evidence for or against him*, such witness shall nevertheless be examined," &c. Many cases may be suggested where the interest of a party would, independently of the verdict, be direct and immediate: for example, in ejectment, the tenant cannot be called to support his landlord's title, inasmuch as a recovery against his landlord would turn the witness out of possession, and therefore his interest is more direct and immediate than the production of the record. I cannot perceive how, if the course pointed out by the statute were pursued, the interest of the witness could be at all varied or affected by the plaintiff's failure in this action: the verdict and judgment would not be producible. I therefore think this is precisely one of those cases in which the statute meant to leave the credit of the witness to the discretion of the jury.

BOSANQUET, J.—A party can only be said to be interested in the event of a suit, if he is to derive some benefit, or to incur some liability, in the event of the suit the one way or the other, by the production of the verdict and judgment. The object of the statute was to point objections rather to credit than to competency.

The rest of the court concurring—

Rule refused (*a*).

(*a*) See Doe d. Bath v. Clarke, ante, p. 203.

1837.

Wednesday, April 19th.

CLARKE *v.* VESTRIS.

BUSBY opposed the justification of one of the bail in this case, on the ground that he had already been rejected by Coleridge, J., at chambers.

The court permitted bail to justify after being disallowed at chambers for not being prepared to give an account of his debts and credits.

It appearing, however, from the statement of the individual himself, verified by the filacer, that he was not *rejected*, but simply disallowed because he was unable at the moment to state correctly the amount of debts owing to and from him; and the bail now stating that he had since examined his books, and his answers being sufficient, the Court allowed him to justify.

Bail justified.

Henderson, for the bail, afterwards obtained a rule nisi to stay the proceedings on the bail-bond. The affidavit upon which he moved stated that the parties had agreed that the proceedings on the bail-bond should not operate a suspension of the proceedings in the original action, and that the defendant had on the 17th pleaded non assumpsit as to part of the plaintiff's demand, and a set-off to the residue.

The defendant was arrested on the 28th March, and gave a bail-bond on the 4th April. The plaintiff declared de bene esse and took an assignment of the bail-bond, and the defendant afterwards, on the 17th April, (having given an undertaking to allow the plaintiff to go on with the original action notwithstanding the proceedings on the bail-bond) pleaded, and bail above justified on the 19th:—The Court stayed the proceedings on the bail-bond, without allowing it to stand as a security, there being time for the plaintiff to go to trial at the last sitting in term, the defendant taking short notice.

Busby shewed cause, on affidavits whence it appeared that the arrest took place on the 28th March, that a bail-bond was given on the 4th April, and that bail above justified on the 19th.—He submitted, that, had the bail justified in due course, the plaintiff might have declared on the 4th, demanded a plea on the 5th, the time for pleading would have expired on the 9th, and on the 10th notice of trial might have been given, in ample time for the first sitting, the 21st; and therefore a trial had clearly been lost, and the plaintiff was entitled, under the rule of Hilary

1837.

CLARK v. VESTRIS.

Term, 2 Will. 4, s. 5 (*a*), to have the bail-bond to stand as a security. [*Tindal*, C. J.—You are yet in time to go to trial at the next sitting, the 28th, and therefore cannot be said to have lost a trial (*b*); for, the other side coming to ask a favour, we will impose upon them the terms of taking short notice of trial for that day.] The object of the new rules was, to introduce an uniformity and certainty in the practice of the several courts. The rule upon which the question here turns will be a dead letter, if parties may avoid it by undertaking that the plaintiff shall proceed in the original action pending the proceedings against the bail.

TINDAL, C. J.—To entitle the plaintiff to have the bail-bond to stand as a security, we must see that he has actually been prevented, "for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes." Here, the defendant was completely in court on the 19th. Under the particular circumstances of this case, the bail having consented that the plaintiff should go on with the original action, notwithstanding the pendency of the proceedings on the bond, I think the plaintiff cannot be said to have lost a trial, within the terms of the rule.

(*a*) By which it is provided, "that, upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the bail-bond shall stand as a security, if the plaintiff shall have declared de bene esse, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes." This rule was framed by Mr. Baron Bayley.

To entitle the plaintiff, under this rule, to have the bail-bond to stand as a security, it must appear that a trial was lost at the time of moving for the rule—Stride v. Hill, 4 Dowl. 709.

(*b*) It lies on the plaintiff to shew that he has lost a trial—Rex v. The Sheriff of Middlesex, 3 Dowl. 194.

I think the rule must be made absolute on payment of costs, the defendant agreeing to take short notice of trial for the last sitting in the term.

1837.

CLARK v. VESTRIS.

The rest of the court concurring—

Rule accordingly (*c*).

BRITTAN *v.* JONES, Executrix of JONES.

Wednesday, April 19*th*.

Evidence that the testator had purchased some chairs twelve months before his death, and that they were seen two months before that event in the house where he resided with his mother and sister (the defendant):—Held, sufficient prima facie evidence to charge the defendant as executrix.

THIS was an action of assumpsit on goods sold and delivered. Pleas—plene administravit—and that the defendant had no assets of the testator at the time of his death in her hands to be administered. Replication, that the defendant had assets of the testator in her hands at the time of his death.

At the trial before the undersheriff of Glamorganshire, on the 3rd instant, it appeared that the defendant was the sister of the deceased; that the deceased and his mother and sister lived together; that, about twelve months before his death, the testator had purchased nine mahogany chairs for 8*l.*; and that these chairs were seen in the house about two months before his decease. On the part of the defendant, evidence was called to shew the extreme poverty of the deceased, who had been an attorney's clerk; that he boarded and lodged with his mother and sister; and

(*c*) Whenever it appears, on the discussion of a motion to set aside a regular bail-bond or attachment, that the plaintiff has been prevented from trying his cause by the irregularity of the defendant's proceedings, he is entitled to have the bail-bond or attachment stand as a security, although it appear that the rule to set it aside might have been disposed of in time to allow the plaintiff to enter and try his cause at the regular time—Casley v. Binns, 2 Meeson & Welsby, 285. But see Rex v. The Sheriff of Shropshire, in Chappell v. Bowdler, 5 Dowl. 256, where it was held that a plaintiff is not considered as having lost a trial in a town cause, if he could have proceeded to trial at any time in the term next after the return of the writ: and therefore, where a plaintiff might have proceeded to trial at the *third* sitting, though he could not at the *first*, he is not entitled to have the attachment stand as a security.

1837.

BRITTAN v. JONES.

that they were obliged to borrow a small sum to pay the expenses of his funeral.

The undersheriff was asked to nonsuit the plaintiff; but he declined to do so, thinking the plaintiff had made out a prima facie case, and the jury found a verdict for the plaintiff.

V. Williams now moved for a nonsuit or a new trial.—He submitted that the plaintiff was bound to shew clearly that assets had come to the defendant's hands before he could charge her as executrix.

TINDAL, C. J.—If there were assets which the defendant might and ought to have taken, but neglected to take, it is no defence to say that she *did not* take possession of them. How are we to assume that the nine chairs spoken of by one of the witnesses did not come to the defendant's hands, when the jury have thought fit to assume that they did? There certainly was a prima facie case. If the chairs had ceased to be the property of the deceased before his death, the defendant would have had no difficulty in proving the fact. It seems to me that we shall do no injustice by declining to disturb the verdict.

Rule refused.

Friday, April 21st.

Where the bail of whom notice has been given are *rejected*, other bail cannot be substituted without the leave of the court or a judge.

JONES *v.* VESTRIS.

THE bail of whom notice had been given in this cause having been rejected, other bail were substituted without the leave of the court or a judge. Upon the substituted bail now coming up to justify—

Archbold objected that the substitution of new bail in the place of bail that had been rejected, was an infraction of the rule of Trinity Term, 1 Will. 4, s. 5, which provides "that the bail of whom notice shall be given shall not be changed without leave of the court or a judge."

1837.

JONES v. VASSALL.

Wightman, contra.—The rule referred to means no more than that a plaintiff shall not substitute new bail for those of whom he has already given notice, before they come up to justify: it was never intended to apply to the case of *rejected* bail; still less, where, as in the present case, they are rejected, not for insufficiency, but merely because they have been indemnified. [*Bosanquet*, B.—I think this is the very case the rule was designed to meet: the intention was, to insure good bail in the first instance.]

Archbold, in support of his objection, referred to *Stroud* v. *Kenny*, Jervis's Rules, 3rd edit. 28, n., where Taunton, J., held the rule in question to apply to bail for prisoners, and to *rejected bail* who had been changed without leave; and to *Rex* v. *The Sheriff of Essex*, in *Levy* v. *Paine*, 4 M. & Scott, 247, where this court held the rule to apply to the case of bail put in by the sheriff for the purpose of rendering the defendant.

After having caused inquiry to be made as to what was the practice on the subject in the other courts—

TINDAL, C. J., said:—It seems to be the well-understood practice of the other courts that new bail cannot be substituted after the rejection of the former, without a special order of the court or a judge. The bail were accordingly—

Rejected.

Wightman afterwards obtained leave to put in and justify the same bail on the 25th.

Pending the discussion of the above point, one of the bail, being asked at whose solicitation he had consented to come up to justify, stated that he attended at the request of a friend whose name he refused to disclose, but added that the individual was neither the defendant's attorney nor the clerk to the attorney, and that he was not indemnified.

Bail cannot be called upon to disclose the name of the party at whose request they appear to justify, provided such party is not the attorney or the clerk to the attorney for the defendant, and they are not indemnified.

1837.

JONES v. VESTRIS.

THE COURT held that the bail was not bound to mention the name of the person at whose request he appeared to justify.

Saturday, April 22nd.

It is not absolutely necessary that affidavits used on motions under the 3 & 4 Will. 4, c. 74, s. 91, should be intituled "In the Common Pleas."

In re BATES.

ON the motion of *Atcherley*, Serjeant, an order had been made for dispensing with the concurrence of the husband of the applicant in a conveyance of property belonging to her, under the statute 3 & 4 Will. 4, c. 74, s. 91. The affidavit upon which the motion was founded not being intituled "In the Common Pleas," the officer declined to file it.

Atcherley, Serjeant, now applied to the court to give a direction to the officer upon the subject.—This court being the only place where such a motion could be entertained, there was, he contended, no necessity for intituling the affidavits at all.

TINDAL, C. J.—The court of Common Pleas being the only place where the motion can be entertained, and the officer appointed by the Chief Justice under the statute the only person with whom the proceedings can be filed, the fact of the affidavits not being intituled in this court is not very material, though it would undoubtedly be better that they should be so intituled.

The rest of the Court concurring, Mr. Sherwood was directed to receive and file the affidavit.

Monday, April 24th.

A notice to quit given by one appointed by the landlord's agent to receive rents, is not sufficient, in the absence of a recognition by the landlord of the party's authority to give the notice: the bringing an action founded upon the notice is not of itself a recognition.

DOE *d.* RHODES and Others *v.* ROBINSON.

THIS was an action of ejectment by the lessors of the plaintiff, mortgagees in possession, to recover certain

premises wrongfully held over by the defendant, who came in as tenant to the mortgagor before the date of the mortgage, after the expiration of a notice to quit.

1837.

Doe d. Rhodes v. Robinson.

At the trial, before Coleridge, J., at the last Assizes at York, the sole question was whether or not the notice to quit was given by an authorized agent. The notice was as follows:—

"I hereby give you notice to quit the possession of the messuages, lands, tenements, and other hereditaments which you now hold as tenant under the mortgagees in possession of the estates of John Chadwick, situate at Bramhope, in the county of York, or elsewhere in the said county, at the expiration of your now current year, and that you leave the same in tenantable state and condition. Dated this 20th day of July, 1835.

(Signed) "Thomas Constable, attorney or "agent for the mortgagees."

Constable, who was called as a witness, stated that he had no knowledge of the lessors of the plaintiff; but that he was employed by Messrs. Upton & Son, of Leeds, who were their agents, to receive the rents of the estate of which the premises in question formed part; that he paid the monies he received into a banker's to the credit of the mortgagees; that he was in the habit of giving notices to quit to tenants on the estate; and that, in three or four instances, the tenants had gone out in consequence of notices so served by him.

On the part of the defendant, it was objected that the notice, having been given by an agent of an agent, without any recognition of his authority by the principals, was not sufficient.

The learned judge refused to nonsuit, but gave the defendant leave to move. A verdict having been taken for the plaintiff—

Wightman, in Michaelmas Term last, obtained a rule nisi for entering a nonsuit pursuant to the leave reserved.

1837.

DOE d. RHODES v. ROBINSON.

He cited *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626, 5 M. & R. 357, where the court of King's Bench inclined to think, that, where a notice to quit is given by an agent of the landlord, the agent ought to have authority to give it at the time when it begins to operate, and that a subsequent recognition of the authority of the agent would not make the notice good; and held, that, assuming that a subsequent recognition of the authority of an agent could in any case be sufficient, the bringing of an ejectment was not a sufficient recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration.

Sir *Gregory Lewin* shewed cause.—*Goodtitle* d. *King* v. *Woodward*, 3 B. & Ald. 689, decides the present case. It was there held, that, though a notice to quit by joint-tenants to a tenant from year to year must be signed by all the joint-tenants at the time it is served, if it be served by one of them; yet, if given by an agent on behalf of the joint-tenants, it is sufficient if his authority be subsequently recognized by all of them: and therefore, where such notice was given by an agent under a written authority which at the time of the service of the notice had been signed only by some of the several joint-tenants, but was afterwards signed by all the others, the subsequent recognition was held sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient. Abbott, C. J., there said: "The occupier having received notice to quit purporting to be given on the part of all the lessors of the plaintiff, had then such a notice as he could act upon with certainty at the time it was given: the inconvenience, therefore, contemplated in *Right* v. *Cuthell* (*a*) does not arise in this case. The only

(*a*) Where there are three joint trustees of an estate, a notice to quit or discontinue the possession given by two is bad, even though

question is, whether the agent had authority to give the notice: and I am of opinion that the maxim of law, 'Omnis ratihabitio retrotrahitur et mandato æquiparatur,' applies here, and that the subsequent recognition by all the lessors of the plaintiff gives effect to the authority." A similar opinion had been previously held in *Doe* d. *Joliffe* v. *Sybourn*, 2 Esp. 877. The authority of those cases is not materially impugned by *Doe* d. *Mann* v. *Walters*. Parke, *J.*, there said, that, inasmuch as there was *some* evidence, though very slight, from which the jury might infer that the agent there had a previous authority, the rule should be, not for a nonsuit, but for a new trial. Here, there was a subsequent recognition by the lessors of the plaintiff (by bringing the action) of the authority of Constable, and certainly some evidence whence the jury were at liberty to infer a previous authority.

Wightman, in support of his rule.—This case is wholly untouched by *Goodtitle* d. *King* v. *Woodward*. Constable, it is conceded, was not the agent of the mortgagees. He was employed by Upton & Son, of Leeds, who were their agents: he was therefore merely the agent of an agent. To hold a notice to quit given by a person so delegated to be a valid notice, binding upon the landlord and upon the tenant, would be going much further than any case has hitherto gone. Supposing a subsequent recognition of the authority of the party to suffice (which may well be doubted), the bringing the action clearly does not amount to such recognition: this was distinctly determined in *Doe* d. *Mann* v. *Walters*. The fact of three or four other tenants of the estate having acquiesced in and acted upon notices similarly given, was no evidence

given in the names of the three, and the third trustee afterwards adopts it and joins in the demise in ejectment—Right d. Fisher v. Cuthell, 5 East, 491, 5 Esp. 149.

1837.

DOE d. RHODES v. ROBINSON.

of a prior authority. [*Bosanquet*, J.—It was *some* evidence: the landlord must be presumed to know the state of his tenantry.] Parke, J., in *Doe* d. *Mann* v. *Walters*, says: "The notice to quit contains an implied assertion that Grylls was the agent of Mann for the purpose of giving that notice; and it is argued that the fact of the defendant having received the notice and kept it without making any objection, was evidence, as against him, to go to the jury, that Grylls had authority to give it. It was not shewn that the defendant had read the paper and assented to it, for it was delivered to the defendant's wife; and there was no evidence to shew that he had ever read it, unless that is to be presumed from the fact of his having kept it. But, even if such a presumption can be made, still it would be very slight evidence that Grylls was the agent of the lessor of the plaintiff; for, whether he had authority or not, was a fact not within the knowledge of the tenant. There is no distinct proof that Grylls had any express authority to manage the affairs of the lessor of the plaintiff. The evidence is that he *did* manage his affairs, and that he received the rent of the premises in question. But a mere receiver of rents, as such, has no authority to determine a tenancy (*b*). I think very little reliance, therefore, can be placed on the form of the notice to quit, or on the fact that Grylls received the rent. The next ground on which it is said that Grylls was authorized to give the notice, is, that the lessor of the plaintiff, by bringing the ejectment, has recognized the authority of Grylls, and therefore, according to *Goodtitle* d. *King* v. *Woodward*, has rendered the notice to quit valid from the time when it was given. I cannot say that I am satisfied with the reasons given for the decision in that

(*b*) It seems that a receiver appointed by the court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit—Doe d. Marsack v. Read, 12 East, 57.

case. But, assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, it ought at all events in this case to have been before the day of the demise laid in the declaration, for the plaintiff must shew a right to the possession on that day. The bringing of an ejectment, therefore, is not in this case a sufficient recognition of the authority of the agent."

TINDAL, C. J.—I think that, were we to allow this verdict to stand, we should be going much further than any of the cases warrant. The notice in question was given by an agent of an agent. I think the lessors of the plaintiff should have been prepared with better evidence, though I am far from saying that there was not *some* evidence, either of an original authority from the mortgagees to Constable to give notices to quit to their tenants, or of a subsequent recognition by them of the notice served by him on the defendant before the day of the demise laid in the declaration. I think justice will be best consulted by making the rule absolute for a new trial; the costs of the first trial to abide the event of the second.

BOSANQUET, J.—Conceiving that there was some evidence to be left to the jury, I am also of opinion that there should be a new trial.

COLTMAN, J., concurring—

Rule absolute accordingly.

1837.

Tuesday, April 25th.

A conveyance was made by one L. to his son for the purpose of giving the latter a colorable qualification to kill game:—Held, that the attorney who prepared and attested the deed, knowing the purpose for which it was to be used, and himself actively furthering the object of the parties, could not afterwards (in trover by the son for the deed) contend that nothing passed to him under it.

It appearing probable that the jury had been misled by strong general expressions of the judge which properly applied exclusively to one of several issues, and the verdict being general—The court granted a new trial, *on payment of costs.*

LORD *v.* WARDLE.

TROVER for a deed or instrument of conveyance, to wit, a certain deed or instrument of conveyance purporting to be made between one Richard Lord, now deceased, of the one part, and the plaintiff and one W. Wilkins of the other part, and purporting to be a conveyance from the said Richard Lord, deceased, to the said W. Wilkins, in trust for the plaintiff, of certain premises and hereditaments therein mentioned, and which said deed or instrument of conveyance was and is of great value, &c. &c., assigning for special damage that the plaintiff had been prevented from completing the sale and conveyance of his estate and interest in a portion of the premises, and had incurred expense in endeavouring to obtain possession of the deed.

Pleas—First, that the plaintiff was not possessed as of his own property of the deed or instrument of conveyance in the declaration mentioned.

Secondly, that, for a long time before and at the time of receiving the instructions for drawing and engrossing the said deed or instrument of conveyance in writing in the declaration mentioned, and before and at the time of receiving instructions for the same, as thereinafter mentioned, the defendant was the attorney and solicitor of and for the said Richard Lord the elder, retained and employed by him as his attorney and solicitor for the prosecuting, soliciting, and managing divers causes, suits, and businesses for the said Richard Lord the elder, and drawing, engrossing, and copying deeds, conveyances, and instruments in writing, and in and about other business of and for the said Richard Lord the elder, for fees and reward to be therefore paid to him by the said Richard Lord the elder; and that he, under and by virtue of such retainer, long before the time of making the said deed or instrument of

1837.

LORD v. WARDLE.

conveyance in the declaration mentioned, had done, performed, and bestowed his work and labour, care and diligence, as such attorney and solicitor, in and about the prosecuting, defending, and soliciting of divers causes, suits, and businesses for the said Richard Lord the elder, and in and about the drawing, engrossing, and copying of divers conveyances and instruments in writing for the said Richard Lord the elder, and had taken and performed and given divers journeys and attendances in and about those businesses and other business of and for the said Richard Lord the elder; and the said Richard Lord the elder, before the time of making, drawing, copying, and engrossing, and the execution of the said deed or instrument of conveyance in the declaration mentioned, and before the giving instructions for the same as thereinafter mentioned, had been, and before and at the time of the drawing, copying, engrossing, and the execution of the said deed or instrument of conveyance, and before and at the time of giving the instructions thereinafter mentioned, was indebted to him the defendant for such his work and labour, care, diligence, and attendance, and journeys, as the attorney and solicitor of and for him the said Richard Lord the elder, in a large sum of money, to wit, the sum of 700*l.*, and so remained and continued from thence until and at the time of his death, and the same was still due and owing to him the defendant; and that the said deed or instrument of conveyance was prepared, drawn, copied, and engrossed by the defendant as the attorney and solicitor of and for the said Richard Lord the elder, and to be paid for by the said Richard Lord the elder, and that he the defendant received his instructions for the same from the said Richard Lord the elder; and that there was not any valuable consideration in money or otherwise from the plaintiff or the said W. Wilkins to the said Richard Lord the elder, save and except the natural love and affection of the said Richard Lord the elder; but the same was a

Second plea.

1837.

LORD v. WARDLE.

voluntary deed of and by the said Richard Lord the elder, and was a conveyance of certain estates the property of the said Richard Lord the elder therein mentioned; and that the immediate purpose and effect thereof was to give to the plaintiff a qualification for killing game, and was executed by the said Richard Lord the elder, and the execution thereof attested by him the defendant, and the same was and remained in the possession of the defendant as the attorney and solicitor of and for the said Richard Lord the elder, and as part of the deeds, muniments, and documents which had come to and were in his hands as the attorney and solicitor of and for the said Richard Lord the elder, and by the means and procurement of the said Richard Lord the elder, and the defendant claimed and now claims a lien upon the same for the debt so due and owing to him by the said Richard Lord the elder, and which still was and remained wholly due and unpaid, and he retained the same for and by virtue of such lien.—verification.

Third plea.

Thirdly, that the said deed or instrument of conveyance was prepared by the defendant as the attorney of Richard Lord the elder, and that he the defendant received his instructions for the same from Richard Lord the elder, Richard Lord the elder being at the time indebted to him in 700*l.*, for business done as his attorney; and that Richard Lord the elder remained so indebted to the defendant at the time of his death, and that the debt still remained due; that the deed was a voluntary conveyance by and from Richard Lord the elder to the plaintiff of certain estates of him the said Richard Lord the elder, made without any other consideration than natural love and affection; and that, at the time of the making or executing the said deed or instrument of conveyance, the said Richard Lord the elder in his lifetime, and the plaintiff, consented and agreed that the said deed or instrument of conveyance should remain in the hands of the defendant, as

a security for the debt due and owing by the said Richard Lord the elder to the defendant as aforesaid, and that the defendant should have a lien thereon for such debt; and which debt was and still remained due and unpaid as aforesaid, wherefore the defendant retained the said deed or instrument of conveyance as a security for the same—verification.

Replication to the second plea.

Replication to the second plea—That the defendant prepared the said deed or instrument of conveyance under and in pursuance of instructions from the said Richard Lord the elder to prepare the same for the use and benefit of the plaintiff, and in order that the same might become the property of the plaintiff; and that the defendant prepared the same accordingly; and that the same afterwards remained in the possession of the defendant, in pursuance of the said instructions, for the use and benefit and as the property of the plaintiff; and that the said deed or instrument of conveyance was not and did not remain in the possession of the defendant as the attorney or solicitor of or for the said Richard Lord the elder, except as therein above mentioned; and that all the defendant's costs and charges in respect of the said deed or instrument of conveyance were paid and satisfied before the time of the conversion thereof by the defendant as in the declaration mentioned.

Replication to the third plea.

Replication to the third plea—That the plaintiff did not consent or agree that the said deed or instrument of conveyance should remain in the hands of the defendant as a security for the said debt so supposed to have been and to be due and owing by the said Richard Lord the elder to the defendant, nor that the defendant should have a lien thereon for such debt, modo et forma—concluding to the country.

Rejoinder to the replication to the second plea.

Rejoinder to the replication to the second plea—That the said deed or instrument of conveyance was not prepared by the defendants for the use and benefit of the

1837.

LORD v. WARDLE.

plaintiff, and in order that the same might become his property, subject to and on payment of all the costs and charges in respect of the said deed or instrument alone, nor did the same remain in the possession of the defendant for the use and benefit and as the property of the plaintiff on the terms in the replication mentioned; but the same was prepared by him the defendant as the attorney and solicitor of and for Richard Lord the elder, on his retainer, and on his instructions, and from the time of the preparation and the execution thereof remained in the possession of him the defendant as the attorney and solicitor of and for the said Richard Lord the elder, and as part of the deeds, instruments, and documents which had come and were in the hands of him the defendant as the attorney and solicitor of and for the said Richard Lord the elder, and by the means and procurement of the said Richard Lord the elder, and subject and liable to the said lien of the defendant thereon in the said second plea mentioned, and which he claimed as in that plea mentioned, &c.

Evidence.

At the trial before Park, J., at the sittings at Westminster after last Trinity Term, the following facts appeared in evidence:—The deed in question, a conveyance by Lord the elder to Lord the younger, the plaintiff in this action, of certain land in the county of Northampton, executed for the purpose of giving the latter a qualification to kill game, had been prepared by the defendant. In support of the plaintiff's case, a bill of costs delivered by the defendant to the plaintiff after the death of Lord the elder, under a judge's summons, was produced. In this bill was contained a charge for preparing the deed in question *on the plaintiff's retainer*. It was further proved that the defendant, in whose possession the deed had remained ever since its execution, had himself caused the deed to be produced before the magistrates, in proof of the plaintiff's qualification, on two several occasions of informations laid

against him for killing game without a qualification; and that, on both those occasions, the informations were in consequence dismissed. The bill of costs delivered to the plaintiff after the death of Lord the elder, besides charges for preparing the deed in question, contained also charges for "attending the plaintiff and his father," and for "attending the plaintiff as his solicitor before the magistrates," on the occasion before alluded to. This bill had been paid.

On the part of the defendant, two witnesses, named Webb and Moore, deposed to having heard the two Lords, both separately and in the presence of each other, repeatedly say that the defendant had a lien upon the deed, and express a desire to be able to raise money for the purpose of taking it out of his hands—the father saying, that, if he could get possession of the deed, he would destroy it—the son, that, if he could get it, he would turn his father out. One of these witnesses also swore, that, on one occasion, when the deed was produced by him, the witness, from the office of the defendant, the plaintiff, on returning it to him, said: "Take the deed back to Mr. Wardle: take care my father does not get hold of it, as Mr. Wardle is to hold it until his debt is paid." It further appeared that the plaintiff was not of age at the date of the grant, and that there had been no change of possession.

On the part of the defendant, it was contended, that, the deed being voluntary, no property passed under it to the plaintiff; and that the fact of the deed remaining in the hands of the defendant, coupled with the language ascribed to the plaintiff when before the magistrates, conclusively shewed that the former had a lien upon the deed for the debt of Lord the elder.

Summing up.

In leaving the question to the jury, the learned judge made strong general remarks upon the circumstances under which the grant appeared to have been executed, intimating a very decided opinion that it was colourable, and

1837.

LORD
v.
WARDLE.

that nothing passed under it to the plaintiff, and dwelling upon the fact of the grantee being under age at the date of the grant, and of the possession remaining unchanged; and ultimately left to them the following questions—first, whether or not the plaintiff was possessed of the deed as of his own property—secondly, whether the deed was the deed of the father or of the son—thirdly, whether or not the plaintiff had entered into any agreement that the deed should remain in the defendant's hands as a security for the debt due to the latter from Lord the elder. The jury having found generally for the defendant—

Wilde, Serjeant, in Michaelmas Term last, moved that the verdict might be set aside and a new trial had, on the grounds of misdirection and that the verdict was against the weight of evidence.—It was not competent to the defendant to dispute the validity of the deed in question; he himself having prepared it and witnessed its execution, and having procured effect to be given to it before the magistrates. And if it were competent to the defendant to raise the question, there is nothing in the evidence given at the trial to warrant the jury in concluding the conveyance to be illegal; for, there is nothing illegal in a father conveying land to his son in consideration of natural love and affection. That the deed was the property of the plaintiff, is beyond question. The second plea sets up a condition to be annexed to the grant upon parol testimony: it is equally an attempt to charge the plaintiff with the debt of another as if an action had been brought against him for it; and is clearly within the whole mischief of the statute of frauds. And the third plea amounts only to an agreement between Lord the elder and Lord the younger, of which the defendant, who was no party to the agreement, seeks to avail himself. The strong observations of the learned judge clearly misled the jury: the only question they could deal with was that which arose

upon the third issue; the remarks of the learned judge applied generally to all the issues, and the finding of the jury is also general.

1837.

LORD v. WARDLE.

A rule nisi having been granted—

Goulburn, Serjeant, and *Humfrey*, shewed cause.—To entitle him to maintain the action it was incumbent upon the plaintiff to prove that he was possessed of the deed as of his own property. That he was a minor at the time of the grant, and that the sole object of the grant was the qualification of the plaintiff to kill game, was proved beyond question. The deed was prepared by the defendant on the retainer of Lord the elder: it was clearly the deed of the father, and remained in the defendant's hands as his attorney. [*Tindal*, C. J.—Could Lord the elder have contended that nothing passed by the deed from himself to his son? And, if not, how can this defendant?] The first issue may have been improperly found for the defendant: but still the evidence substantiated the second and third. There was nothing to prevent the plaintiff from concurring in the agreement to deposit the deed in the defendant's hands as a security for the payment of his father's debt: and there was abundant evidence to shew that he did concur. In *Ogle* v. *Story*, 4 B. & Ad. 735, premises that were mortgaged, with a proviso for reconveyance, at the costs of the mortgagor, on payment of principal and interest, were sold, and the vendee was to pay off the mortgage on the completion of the purchase; but the mortgagor's attorney, who held the deeds, refused to deliver them to the vendee until his own bill was also paid: the bill contained some items fairly chargeable on the occasion, as, costs due from the mortgagor and others, which were properly payable by the mortgagee: it was held that the attorney might enforce his lien on the deeds against the vendee to the whole extent of the bill; and that the vendee, having been obliged to pay it for

1837.

LORD v. WARDLE.

the purpose of releasing the deeds, could not recover back from the attorney the amount unduly charged. The alleged misdirection in the present case, at all events, could not apply to the second and third issues.

Wilde, Serjeant, *Hill*, and *Busby*, in support of the rule.—It clearly was not competent to the defendant, who prepared the deed, and was twice instrumental in giving effect to it as a valid deed in a court of justice, to say that it was not a bona fide conveyance. After allowing the deed to be used for a purpose which required that the estate should pass under it, the grantor himself would be estopped both in law and in equity from denying its validity—*Roberts* v. *Roberts*, 2 Daniel, 143; *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 369, 2 Chit. 272; *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391; *Cecil* v. *Butcher*, 2 Jac. & W. 565; *Willis* v. *Robinson*, 4 Bligh, 101. The second and third pleas raised totally different questions; and yet they were left to the jury substantially as one and the same question: the distinction between them was not properly pointed out to the jury. They were told, throughout the whole summing up, that the main question was, in whom was the property in the deed—whether in the father or in the son: whereas, the learned judge should have told them that it was not for them to consider whether or not the land was *intended* to pass by the deed, but that in point of law the land *did* pass. The agreement attempted to be set up under the third plea was altogether inconsistent with the case set up under the first and second pleas. And that plea discloses no agreement between the plaintiff and defendant that the latter should hold the deed as a security for what might be due to him from Lord the elder: the agreement is pleaded as an agreement between the grantor and grantee. It was not competent to the defendant to prove by parol evidence that the conveyance was made subject to a condition for the payment of a debt due

1837.

LORD v. WARDLE.

from the grantor. The verdict being general, if the jury were misdirected in any part of the case, the plaintiff is entitled to have a new trial. Suppose the jury were not satisfied as to the existence of any such agreement as that set up by the third plea, but found for the defendant on that which was assumed by the learned judge in his summing up to be the main question in the cause, viz. whether the deed was the property of the plaintiff or of his father; in that case, entering the verdict for the defendant upon the last two issues would be making them find contrary to their conviction. [*Tindal*, C. J.—On what part of the evidence could the jury have found the last issue in favour of the plaintiff? Look at the conversations spoken to by the witnesses Webb and Moore?] The evidence of those witnesses, supposing them to be worthy of credit, went to shew only an agreement between the father and the son as to the deed remaining in the hands of the defendant. It is perfectly clear, that, if there be a misdirection on any one point, the onus of shewing that the verdict upon the last issue stands clear of such imputation, lies on the other side. [*Bosanquet*, J.—The question is, whether the jury were not impressed with a notion, that, if they found the deed to be the deed of the father, they must also find for the defendant on the third issue. The two points having been so mixed up, the jury, it may reasonably be assumed, were misled.

TINDAL, C. J.—In this case three issues were raised, and the jury have returned a general verdict for the defendant. With respect to the first issue—whether the deed in question was or was not the property of the plaintiff—I think the verdict should have been the other way: the property in the deed could not be in any other person than the grantee. If the first issue was improperly found for the defendant, I think the second was so too; for, Lord the elder never could give to the defendant a lien upon a

1837.

LORD v. WARDLE.

deed which was the property of another. With respect to the third issue, however, I am not disposed to quarrel with the verdict. It is contended that the jury were misled by the manner in which the learned judge left the questions to them. Had I been on the jury, I must confess I should not have entertained any doubt as to the meaning of the learned judge. But, upon the whole, I am not prepared to say that it would not be more satisfactory and more consonent with justice to have the real question in the cause more concisely and accurately presented to a second jury—not in the ordinary course, as for a misdirection, but upon payment of costs.

BOSANQUET, J., and COLTMAN, J., concurring, PARK, J., dissenting—

Rule absolute, on payment of costs.

Wednesday, April 26th.

In covenant on an indenture of lease, the breach alleged was, that, after the making of the indenture and during the term thereby granted, to wit, on the 25th March, 1836, 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then elapsed, became and was and still is in arrear to the plaintiff &c. The defendant pleaded that no quarter's rent, ending on the said 25th March, 1836, then became or was due or in arrear by virtue of the said indenture in the declaration mentioned, in manner and form as the plaintiff had in his declaration in that behalf alleged:—Held, ill, on special demurrer.

BADEN *v.* FLIGHT.

THE declaration stated, that, on the 12th August, 1832, by a certain indenture then made between the plaintiff of the one part and the defendant of the other part, the plaintiff demised and leased unto the defendant, his executors, administrators, and assigns, a certain messuage &c., with the appurtenances, in the said indenture mentioned and described; to have and to hold the said messuage &c., with the appurtenances, unto to the defendant, his executors, administrators, and assigns, from Michaelmas-day then next ensuing, for and during and unto the full end and term of thirteen years and the half of another year from thence next ensuing, and fully to be complete

1837.

BADEN v. FLIGHT.

and ended; yielding and paying therefor yearly and every year during the said term unto the plaintiff, his executors, administrators, and assigns, the yearly rent or sum of 132*l.* 10*s.*, by four equal and quarterly payments each and every year of the said term, that is to say, the 25th December, the 25th March, the 24th June, and the 29th September; the first payment thereof to begin and be made on the 25th December next ensuing the day of the date of the said indenture, and that free and clear, &c.: and the defendant, for himself, his heirs, executors, and administrators, did thereby covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that the defendant, his executors, administrators, and assigns, would, yearly and every year during the said term thereby granted, well and truly pay and cause to be paid unto the plaintiff, his executors, administrators, or assigns, the said yearly rent or sum of 132*l.* 10*s.* upon the several days and times, and in manner thereinbefore mentioned and appointed for payment thereof: by virtue of which said demise, the defendant, afterwards, to wit, on the 30th September, 1822, entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid; that, after the making the said indenture, and during the said term thereby granted, to wit, on the 25th March, 1836, a large sum of money, to wit, the sum of 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then elapsed, became and was due and still is in arrear to the plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the defendant by him in that behalf so made as aforesaid.

The defendant pleaded—that no quarter's rent ending on the said 25th March, 1836, then became or was due or in arrear by virtue of the said indenture in the declaration

Plea.

1837.

BADEN
v.
FLIGHT.

mentioned, or according to any of the provisos, agreements, covenants, or terms therein contained, or anything therein mentioned, in manner and form as the plaintiff had in his declaration in that behalf alleged—concluding to the country.

Special demurrer.

To this plea the plaintiff demurred specially, assigning for causes—that the plea of riens en arriere is not admissible in an action for a breach of covenant for non-payment of rent on a specified day; that the plea ought to have shewn specifically and with sufficient certainty how the quarter's rent did not become due or in arrear, or how the defendant was discharged from the payment thereof; that it ought to have shewn how the quarter's rent was paid or discharged, instead of alleging generally that it was not due or in arrear; that, as a plea of satisfaction, the plea was bad and argumentative; that it was double, inasmuch as it put in issue, not only that the quarter's rent ever became due or in arrear, but also that it was due or in arrear at the time of the commencement of this suit; that the plea ought to have shewn specifically a performance or excuse for the performance of the said covenant to pay the quarter's rent; and that it was in other respects insufficient and informal &c.

Joinder.

The defendant joined in demurrer.

Channell, in support of the demurrer.—The contract declared on is, a contract for payment by the defendant to the plaintiff of certain rent on certain days. The declaration alleges, that, after the making of the indenture, and during the term thereby granted, to wit, on the 25th March, 1836, a large sum of money, to wit, 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then elapsed, became and was due and still is in arrear to the plaintiff, &c. The defendant merely pleads that no quarter's rent, ending on the said 25th March, 1836, then became or was due or in arrear

by virtue of the indenture in the declaration mentioned. Now, admitting the fact stated in the plea to be true, it is informal, and no answer to the action. The indenture shews that the rent was due: and the plea admits the contract. The defendant should either have shewn *how* he had performed the contract, or how he claimed to be discharged from its performance.

Hoggins, in support of the plea.—The defendant by the plea simply traverses a fact alleged in the declaration. It may be that upon a view of the whole deed it would appear that the rent was not payable until a day subsequent to that mentioned: and that is a fact which the defendant had a right to traverse and to have submitted to a jury. [*Tindal*, C. J.—Had the defendant proposed to raise that question, he should have craved oyer of the deed.]

Channell, in reply, was stopped by the court.

TINDAL, C. J.—It appears to me that the substantial allegation in this declaration is, that, after the making of the indenture declared on, and during the term thereby granted, two quarters' rent became due and in arrear from the defendant to the plaintiff, and that the words "ending on the day and year last aforesaid" carry it no further. It is clearly no answer to the action to say merely that no rent became due on the particular day: still less that no rent was in arrear; for, riens in arrear is no plea to covenant for non-payment of rent on a particular day—*Hare* v. *Savil*, 1 Brownl. & G. 19: "Action of covenant brought upon an indenture, upon a special covenant to pay rent at certain days therein specified and reserved. The defendant pleads that no rent was behind. The plaintiff demurs to that plea: and it was held by the whole court to be a bad plea in covenant; for, by that plea, the defendant *confesses*

1837.

BADEN v. FLIGHT.

the covenant broken, and that plea tends but *in mitigation of damages*" (*a*).

The rest of the court concurring—

Judgment for the plaintiff.

(*a*) In a further report of the same case, 2 Brownl. & G. 273, it is said: "It was agreed that the covenant shall not alter the nature of the rent, but that nothing behind, or payment at the day, were good pleas."

In Warner v. Theobald, Cowp. 588, riens in arriere was held to be a good plea to an action of *debt* for rent. In the course of the argument, it was suggested by Wood that "the whole distinction was between *debt* and *covenant*. That, in the latter, riens in arriere was clearly a bad plea, for the reason assigned in *Hare* v. *Savil*; 'because it confesses the covenant to be broken, and tends but in mitigation of damages.' But debt is to recover the specific sum due; and, if it is paid, there can be no damages for the detention. It is essential that it should be due at the time of the action brought; and that is the only point for the defendant to answer. The form of the plea is nil debet, in the *present* tense, which has reference to the time of the action brought. In covenant it is, non infregit conventionem, in the *past*. In detinue the principle is the same: the plea is non detinet. The only difference is, that the one is to recover goods and chattels, the other money. But, in this case, riens in arriere is a fairer plea than nil debet: because nil debet puts the whole declaration in issue; whereas this confines the question to the single fact 'whether such rent was due.' Yet nil debet would have been a good plea—Hardr. 332; 2 Ld. Raym. 1503; Bull. N. P., 2nd edit., 170. Indeed, between nil debet and riens in arriere there is no substantial difference." And of this opinion was the court.

And see Comyns's Digest, title "Pleader" (2 V. 14).

Wednesday, April 26th.

A charge in an attorney's bill, for searching for an old judgment, and advising as to its revival, does not constitute an item taxable within the statute, 2 Geo. 2, c. 23, s. 23.

In re RICE.

F. V. LEE moved that an attorney's bill might be referred to one of the prothonotaries for taxation, upon the usual terms. The item in respect of which it was contended

1837.

In re RICE.

that the case fell within the statute 2 Geo. 2, c. 23, s. 23 (*a*), was, a charge for searching for an old judgment in this court, and advising as to its revival. [*Park*, J.—Is it not necessary, in order to bring a case within the statute, to shew an action *pending*?] There are many cases shewing that that is not necessary. A warrant of attorney (*Sandom* v. *Bourne*, 4 Camp. 68, *James* v. *Child*, 2 C. & J. 678, 2 Tyr. 732, *Wilson* v. *Gutteridge*, 4 D. & R. 736, 3 B & C. 157, or a dedimus potestatem (*Ex parte Pritchett*, 1 N. R. 266), charged in an attorney's bill, is a sufficient item to enable the court to refer the bill for taxation, though, with this exception, it be entirely for conveyancing. So, where one of the charges was for drawing an affidavit of debt, in order to hold a party to bail, which appeared to have been sworn, the court of King's Bench held this to be a charge for business done in court, which made the bill taxable—*Winter* v. *Payne*, 6 T. R. 645. And a charge in an attorney's bill for attending at a lock-up house and obtaining the defendant's release, and filling up a bail-bond, will render the bill subject to taxation—*Fearne* v. *Wilson*, 6 B. & C. 86, 9 D. & R. 157. So, in *Smith* v. *Taylor*, 5 M. & P. 66, 7 Bing. 259, charges by an attorney for attending the defendant and advising him, he having been served with a writ after paying the amount of the debt, and attending him and advising on an action that had been brought against him, were held to be taxable items.

TINDAL, C. J.—There is no charge here for a *proceeding in court*. A charge for advising on the revival of an old judgment is certainly one degree removed from any thing that has hitherto been held to constitute a taxable

(*a*) The statute authorizes the application to refer a bill for taxation to be made "unto any of the courts, or unto a judge or baron of any of *the courts* respectively *in which the business contained in such bill*, or the greatest part thereof in amount or value, *shall have been transacted*."

1837.

In re RICE.

item. In *Fenton* v. *Correa*, 2 C. & P. 45, R. & M. 262, charges for searches to see whether satisfaction of a judgment was entered, or whether an issue was entered and docketed, were held not to constitute taxable items in an attorney's bill: and in *Ex parte Bowles*, 1 Scott, 583, charges for searching the warrant of attorney office, and for a fee paid there, were likewise held not to make an attorney's bill taxable under the statute.

The rest of the court concurring—

Rule refused.

CHOLMONDELEY, Executrix of HEBER, *v.* PAYNE and FOSS.

Thursday, April 27th.

Two counts upon the same contract, the one alleging the defendant to be liable jointly with another, the other alone, will not be allowed.

THE first count of the declaration stated, that the defendants had proposed to the plaintiff to undertake the sale of a library, they preparing and printing catalogues, advertising the sales, and settling with the auctioneers employed, for a commission of 12½ per cent.; that the defendants would be responsible, *together with the auctioneers*, for the proceeds of the sales, having power to give credit to the booksellers to a certain extent, to wit, &c.; that the plaintiff accepted the proposal, and employed the defendants for the purpose aforesaid; that they employed an auctioneer who sold one portion of the books on the 1st April, 1836, and another portion on the 1st June, 1836; that the time for credit had elapsed, but the defendants neglected to pay the monies received by them.

The second count stated, that, in consideration of the plaintiff's retaining the defendants, upon their request, to sell on commission certain goods of the plaintiff, to wit, books, manuscripts, and prints, the defendants undertook to be responsible for the prices of the same; that they afterwards sold the goods, but neglected and refused to pay over the proceeds to the plaintiff.

1837.

CHOLMONDELEY v. PAYNE.

There were also counts for money had and received and on an account stated.

Upon an affidavit stating that the cause of action in each of the special counts was the same, application was made to a judge at chambers to strike out one of them. The learned judge declining to interfere—

F. Robinson, on a former day, obtained a rule calling upon the plaintiff to shew cause why one of the special counts should not be struck out of the declaration.

Butt, shewed cause.—The two special counts disclose separate and distinct causes of action: in the first, the defendants are stated to have become liable jointly with the auctioneers; in the second, alone. The plaintiff is therefore clearly entitled to have them both: if confined to one of them, there might be a variance between the count and the evidence at the trial.

F. Robinson, in support of his rule.—By the "First rules and regulations" as to pleadings, of Hilary Term, 4 Will. 4, s. 5, it is provided that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each: therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed; ex. gr. counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." Here, the two counts are founded substantially on the same contract: the second merely omits some of the special circumstances that are alleged in the first. In *Jenkins* v. *Treloar*, 1 M. & Welsby, 16, 1 Tyr. & G. 316,

1837.

CHOLMONDELEY v. PAYNE.

4 Dowl. 490, where the declaration contained one count claiming a fee or reward in the name of metage on coals imported into the port of Truro, alleged to be due to the plaintiff as lessee under the corporation of Truro of an antient office of meter, to which the fee was stated to be incident, and another count claiming the same sum as a port duty; the court held that these counts were only different statements of the same subject-matter of complaint within the meaning of the above rule, and that one of them must be struck out (*a*). If there should be any variance between the contract set forth in the count and that proved, the judge at Nisi Prius would allow it to be amended under the statute 3 & 4 Will. 4, c. 42, s. 23. In *Hanbury* v. *Ella*, 3 N. & M. 438, 1 Ad. & E. 61, the variance that was allowed to be amended was one of far greater magnitude than the variance here could be: there, a contract by which A. guaranteed to B. the amount of a debt to be contracted with B. by C. was described in pleading as a promise to *pay* the debt to be so contracted; and the court sanctioned an amendment ordered at Nisi Prius, by substituting the word "guarantee" for "pay."

TINDAL, C. J.—Upon reading the first two counts of of this declaration, I am unable to discover that they relate to two distinct subjects matter; and therefore I think

(*a*) In Lawrence v. Stephens, 3 Dowl. 777, which was an action respecting tithes, the plaintiff introduced two counts into the declaration, one for the treble value of tithes not set out, the other for the same tithes bargained and sold; and the court conceiving this to be a violation of the rule, ordered the last count to be struck out, with costs; but bound the defendant to agree not to set up a composition at the trial, or that, if he did, the declaration might be amended. But see Thornton v. Whitehead, 1 M. & Welsby, 14, 1 Tyr. & G. 313, 4 Dowl. 747, where the first count of the declaration was framed on the 11 Geo. 2, c. 19, s. 18, for double rent, and the second count for use and occupation, and the court refused a rule to strike out one of the two counts. And see the pleadings in Wilkinson v. Hall, ante, p. 301.

we must abide by the rule, the terms of which are very express. The only way in which the plaintiff can have the benefit of the two counts, is, by referring the matter back to the judge at chambers to make the indorsement on the summons, or give the certificate on the face of his order, under the 6th and 7th clauses of the rules of pleading referred to, according to the course adopted by the court of Exchequer, in *Jenkins* v. *Treloar* (*b*).

(*b*) The 6th clause provides, that, "where more than one count, plea, avowry, or cognizance shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon *the judge shall order accordingly, unless he shall be satisfied*, upon cause shewn, *that some distinct subject-matter of complaint is bona fide intended to be established in respect of each of such counts*, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances; in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied, and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed."

The 7th, that, "upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid upon the ground that some distinct subject-matter of complaint was bona fide intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the court or judge before whom

1837.

CHOLMONDELEY v. PAYNE.

PARK, J.—It is perfectly clear that *the court* has no power to make such an order.

BOSANQUET, J.—Our rule will be framed precisely in the terms of the rule in the case of *Jenkins* v. *Treloar*. In the present state of the rules of pleading, I think it behoves the judges to be very liberal in allowing amendments under the 3 & 4 Will 4, c. 42.

COLTMAN, J., concurred.

Rule absolute, accordingly.

Thursday, April 27th.

Two actions of trespass and all matters in difference between the parties touching a disputed right of way, were referred to arbitration. The arbitrator by his award directed that the defendant should give an undertaking to discontinue the user of the way in question. On a motion for an attachment for non-performance of the award, the order of Nisi Prius having been made a rule of court, the defendant swore that he had not himself used the way, nor had it been used by any of his servants with his consent or knowledge:—The court refused to grant the attachment.

RUSSELL *v.* YORKE.

THE plaintiff and defendant, gentlemen of fortune possessing adjoining estates in Northamptonshire, differed as to whether or not a certain public pathway had been stopped up under an inclosure act, and a verdict had been

the trial is had shall be of opinion that no such distinct subject-matter of complaint was bona fide intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance with respect to which the judge shall so certify."

For the practice as to striking out superfluous counts before the making of the above rules, see Tidd's New Practice (edit. 1837), 218, 219: and for decisions upon the rules, 219, 220.

Where two or more counts are founded on the same ground of complaint, the rule for striking them out cannot be obtained without an *affidavit* that they are identical, or else the rule must be drawn up "on reading the declaration"—Roy v. Bristow, 2 M. & Welsby, 241, 5 Dowl. 452.

found for the plaintiff in an action of trespass brought by him against the defendant for using the way. The defendant obtained a rule nisi for a new trial; pending which a second action was brought for other alleged trespasses. Ultimately, the two causes and all matters in difference between the parties were referred to an arbitrator, who by his award directed, amongst other things, that the defendant should undertake not again to use the way in question. The order of Nisi Prius was afterwards made a rule of court, and the defendant was duly served with the award, and gave the required undertaking.

Adams, Serjeant, on a former day in this term, upon affidavits alleging various acts of trespass over the locus in quo by the defendant's domestic and other servants, obtained a rule nisi for an attachment against the defendant for disobedience of the rule of court.

Wilde, Serjeant, now shewed cause.—He produced an affidavit made by the defendant himself, in which he swore, that the acts of user of the way in question alleged in the affidavits upon which the motion was founded, were committed without his consent or knowledge; that he had never since the date of the undertaking used the way himself; nor did he ever order or authorize any of his servants or labourers to use it: and also an affidavit to the same effect sworn by the parties by whom the alleged trespasses were committed, and who were, with one exception, farm servants of the defendant. The learned Serjeant submitted, that the defendant had been guilty of no such wilful breach of his undertaking as to render him liable to be proceeded against criminally for a contempt of the rule of court; and that all that the undertaking meant, was, that the defendant should not himself use the way, or permit it to be used by any of his servants in the course of his service.

1837.

RUSSELL v. YORKE.

Adams, Serjeant, in support of his rule, contended, that, unless the undertaking meant that the defendant should not only himself abstain from using the way in question, but also prevent his servants and dependents from doing so, it would be altogether nugatory.

TINDAL, C. J.—The sole question is, whether or not the defendant has kept good faith with the plaintiff. The affidavits produced in answer to the rule satisfy me that he has done so. He swears that the trespasses complained of were committed by his servants without his consent or knowledge; that he has never since the date of the undertaking used the way himself, nor did he ever order or authorize any of his servants or labourers to use it. The instances of user relied on by the plaintiff are all, with one exception, by day labourers, who cannot be considered quite so much under the control of their employers as domestic servants might be.

PARK, J.—This is an application of a criminal nature. There is not the slightest colour or pretence for it. The case might have been different, had it appeared that the plaintiff had seen his servants using the way in question, without interfering to prevent it.

BOSANQUET, J.—There is not the slightest pretence for imputing bad faith to the defendant.

COLTMAN, J., concurring—

Rule discharged.

1837.

Thursday, April 27th.

BOULTON *v.* WELSH.

In an action by an indorsee against an indorser of a promissory note, the following letter addressed by the plaintiff to the defendant—"The promissory note for 200*l.* drawn by H. H., dated the 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore request you will let me have the amount forthwith"—was held not to be a sufficient notice of dishonor, inasmuch as it conveyed no intimation that the note had been duly presented and dishonored.

ASSUMPSIT by an indorsee against an indorser of a promissory note for 200*l.*, drawn on the 18th July, 1836, by one Henry Hanley, and payable three months after date. Plea, no notice of dishonor: issue thereon.

At the trial, before Park, J., at the Sittings at Guildhall in Michaelmas Term last, the plaintiff proved the due service upon the defendant of the following notice:—

"33, Northampton Square, Oct. 22, 1836.

"Sir,—The promissory note for 200*l.* drawn by Henry Hanley, dated the 18th July last, payable three months after date, and indorsed by you, *became due yesterday, and is returned to me unpaid.* I therefore give you notice thereof, and request you will let me have the amount therof forthwith.

"W. J. Boulton."

On the part of the defendant it was contended that the above letter was not a sufficient notice of the presentment and dishonor of the note, according to the authority of *Hartley* v. *Case*, 1 C. & P. 555, 6 D. & R. 505, 4 B. & C. 339, and *Solarte* v. *Palmer*, 5 M. & P. 475, 7 Bing. 530; Com. Scac. 1 Tyr. 371, 1 C. & J. 417; Dom. Proc. 1 Scott, 1, 1 New Cases, 194.

The learned judge thought the notice sufficient, and directed the jury to find for the plaintiff; reserving to the defendant leave to move to enter a nonsuit instead, should the court be of a different opinion.

Thesiger, in Michaelmas Term last, accordingly obtained a rule nisi.

Talfourd, Serjeant, now shewed cause.—The letter in question was a sufficient notice to the defendant of the dishonor of the note. The cases cited do not apply, for,

1837.

BOULTON v. WELSH.

in both of them the notice differed materially from that given in the present case, and in neither did it purport to be a notice of dishonor. In *Hartley* v. *Case*, the letter intended as notice of the dishonor of the bill did not assert the fact of its having been dishonored, but was a mere demand of the amount; and in *Solarte* v. *Palmer*, the letter relied on merely stated that a bill, describing it, had been put into the hands of the writer (an attorney) by the holder, with directions to take legal measures for the recovery thereof. And these are cases which the courts will not be inclined to extend. In *Hartley* v. *Case*, Abbott, C. J., says: "No precise form of words is necessary in a notice of the dishonor of a bill of exchange or promissory note; but I take it that notice to the drawer of a bill, if dishonored, must convey definite information to the drawer what the nature of the bill is, and the fact that it has been dishonored by the acceptor." Does not the notice in the present case contain all that the Lord Chief Justice there says it must contain? The words "returned to me unpaid" clearly imply a due and legal presentment. [*Bosanquet*, J.—Consistently with that letter, the note might have been presented on the 22nd October. *Tindal*, C. J.—The absence of the word "dishonor" creates an ambiguity.] The letter would clearly convey to the mind of any mercantile man the fact that the note had been duly presented to the maker and returned dishonored. [*Tindal*, C. J.—I freely admit that no mercantile person reading that letter would be likely to misunderstand it. But the only question for us to consider, is, whether the case is not to be governed by *Hartley* v. *Case* and *Solarte* v. *Palmer*.] In *Hartley* v. *Case*, it is true, the court of King's Bench held, that, in a letter intended as a notice of dishonor, the *presentment* and *dishonor* ought to be stated as specific facts; and that it is not sufficient for the letter merely to demand the money of the drawer, and leave him to infer from that circumstance that the bill has been dis-

honored. But, the Exchequer Chamber and the House of Lords somewhat relaxed the severity of that rule in *Solarte* v. *Palmer;* holding that the notice of dishonor should at least inform the party, either in express terms, or *by necessary implication*, that the bill has been dishonored, and that the holder looks to him for payment of the amount. [*Bosanquet, J.—Solarte* v. *Palmer* comes very near this case: if the letter here had alleged a presentment on the day the note became due, it might have been sufficient.] The letter states that the note "became due yesterday, and is returned to the indorsee unpaid." What more specific information could or should be required?

Busby, in support of the rule.—The letter in question neither in express terms or by necessary implication informs the defendant that the note has been presented to the maker and has been returned unpaid by him: one or the other is essential. In *Solarte* v. *Palmer*, evidence was given of the presentment and *actual* dishonor of the bill. And in *Hartley* v. *Case*, 6 D. & R. 508, Abbott, C. J., says: "Notice to the drawer of a bill, if dishonored, *must convey definite information* to the drawer what the nature of the bill is, and the fact *that it has been dishonored* by the acceptor. The letter in question does not convey the one or the other. It does not say what the bill is, by whom drawn, when due, or when drawn, *or that it has been presented and dishonored.*" And Bayley, J., says: "Whether a notice on the day the bill becomes due be or be not premature, it is not essential to decide in this case, because here *the notice does not even inform the drawer that the bill has been presented.*" So, here, it is perfectly consistent with what is stated in this notice, that the plaintiff had negotiated the note, and that the party by whom it had been returned to him had neglected to present it. Convenience requires that no latitude of expression should

1837.

BOULTON v. WELSH.

be allowed in notices of this description, but that they should be confined to the strictest and most concise terms.

TINDAL, C. J.—I am wholly unable to distinguish this case from those that have been referred to, without having resort to a subtlety and niceness that would entirely destroy the practical utility of the rule those cases have solemnly laid down, viz. that the notice of dishonor must inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill or note has been dishonored by the acceptor or maker, and that the holder looks to him for payment. I cannot but regret in the present case the necessity I feel for holding the notice insufficient: but it certainly does not give the defendant information whence he is bound to know that payment of the note had been duly demanded of the maker and refused by him. The letter merely states that the note became due on the day preceding, and was returned unpaid: consistently with that notice, there may have been no presentment to the maker of the note. The form of a protest given by the 9 & 10 Will. 3, c. 17, for non-payment of a bill, is as follows:—"Know all men, that I, A. B., on the —— day of ——, at the usual place of abode of the said ——, have demanded payment of the bill of which the above is a copy; which the said ——— did not pay; wherefore I, the said ——, do hereby protest the said bill. Dated this —— day of ——." The two important points upon which the notice must be precise, are, the presentment of the bill or note to the acceptor or maker, and the non-payment. The letter in the present case is deficient in the former requisite. I therefore think this rule must be made absolute.

PARK, J.—Although perfectly satisfied that no ordinary person reading this letter could entertain a doubt as to what the writer intended to convey, I concur in thinking

1837.

BOULTON v. WELSH.

that we cannot get over the authorities referred to—*Hartley* v. *Case* and *Solarte* v. *Palmer*. The letter contains no legal notice of the dishonor of the bill.

BOSANQUET, J.—I am of the same opinion. The present case is not distinguishable from *Hartley* v. *Case* and *Solarte* v. *Palmer*; more especially the latter.

COLTMAN, J.—It is with extreme regret that I concur in the judgment that has been pronounced by the rest of the court. The case must be governed by those cited. This decision will at all events have a beneficial tendency, inasmuch as it will induce more attention to be paid to the wording of these notices.

Rule absolute (*a*).

(*a*) In Norris v. Salomonson, ante, 257, the drawer of a bill being asked if he was aware that the bill had been dishonoured, answered: "Yes: I have had a very civil letter from Mr. G. on the subject; and I will call and arrange it." In an action against the drawer, it was held that the above admission relieved the plaintiff from the necessity of proving a regular notice.

BLATCHFORD *v.* The Mayor, Aldermen, and Burgesses of the Borough of PLYMOUTH.

Thursday, April 27th.

THE declaration stated that the defendants, by their name of the mayor and commonalty of the borough of

The defendants demised to the plaintiff a mill-house and mill, with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder in which the same water then ran or flowed, and the flood-gates, sluices, and other waterworks therein, together with all erections &c.; excepting and always reserving out of the said demise and grant unto the defendants, their successors and assigns, so much of the said stream as should be sufficient for the supply of such and so many of the inhabitants of Plymouth, and all such bodies politic and corporate, officers, and departments of his majesty's service having establishments within or near to the said borough, or other person or persons whomsoever, as the defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat; provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted, times of needful reparation and cleansing the said trench

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

Plymouth, had demised to the plaintiff, his executors, administrators, and assigns, a certain mill-house and mill used for the grinding of corn and grain commonly called or known by the name of the Higher Grist Mill, situate, &c., with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other water-works therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, benefit of grinding corn and grain, and all manner of other rights, privileges, advantages, easements, profits, commodities, and appurtenances whatsoever, to the said mill-house, mill, and premises belonging, or in any wise appertaining: excepting and always reserving out of the said demise and grant, unto the defendants, their successors and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the defendants as should be sufficient for the supply of such and so many of the inhabitants of

or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted." And the defendants covenanted for quiet enjoyment by the plaintiff, his executors, administrators, and assigns, of the said "mill-house, mill, water-works, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever of or by M. Brodrick, her heirs, &c., or of or by the defendants, their successors or assigns, or any other person or persons whomsoever rightfully claiming or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement." The breach assigned was, that "the defendants, on &c., and on divers days &c., wrongfully and injuriously drew and took, and caused and procured to be drawn and taken from and out of the said stream divers large quantities of the water thereof, although the residue of the water of the said stream which on those days was left to flow to the said mill was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof." At the trial it appeared that no acts whatever had been done by the defendants since the date of the indenture to diminish the supply of water to the plaintiff's mill; that the only water drawn from the stream in question was taken for the supply of certain individuals under contracts entered into long before the grant to the plaintiff, and under an act of the 27 Eliz. c. 20, and another act of the 5 Geo. 4, c. 49, for the supply of another mill and a government victualling office:—Held, first, that the lease was not a demise of any specific quantity of water; secondly, that a diminution of water occasioned by the supplies above mentioned under contracts entered into by the defendants at a date prior to the making of the indenture, was not a breach of their covenant for quiet enjoyment; thirdly, that the breach was not well assigned.

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

the town and borough of Plymouth, and all such bodies politic and corporate, officers, and departments in his majesty's service, having establishments within or near to the said borough, or other person or persons whomsoever, as the defendants had then already contracted or agreed or should at any time thereafter contract or agree to supply with water from their said stream or leat; provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted, times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted: also excepting and reserving full and free liberty, license, and authority for Mary Brodrick, her heirs and assigns, and also to and for the defendants, their successors and assigns, and their respective agents, workmen, and servants, twice in every year during the said term intended to be by the said indenture granted, or oftener if occasion should require, to enter into and upon the said mill-house, mill, dwelling-house, and premises thereby demised, and every part thereof, to view the state and condition of the same, and likewise of the said trench or leat belonging to the defendants; and also excepting and reserving unto the defendants, their successors and assigns, certain fines, penalties, forfeitures, sum and sums of money in the said indenture more particularly mentioned and described—to have and to hold the said mill-house, mill, &c., with the use of the water running to the said mill, and the waterworks thereon, and all and singular other the premises in the said indenture before mentioned and described, and thereby demised, or intended so to be, with their and every of their customs, liberties, privileges, advantages, members, and appurtenances whatsoever, except as before excepted, unto the plaintiff, his executors, administrators,

Proviso.

Habendum.

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

and assigns, from the 24th June, 1832, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended; the plaintiff yielding and paying, &c.: that the defendants, by their then name of the mayor and commonalty, did thereby, for themselves, their successors and assigns, covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that, the said plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements thereinbefore contained by him and them to be observed and performed, should and lawfully might peaceably and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, water-works, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever of or by the said Mary Brodrick, her heirs, executors, administrators, and assigns, or of or by the defendants, their successors or assigns, or any other person or persons whomsoever rightfully claiming or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement: Breach, that, although the plaintiff had always, from the time of the making the said indenture hitherto, well and truly paid the said rent by the said indenture reserved on the days and in the manner in the said indenture appointed for payment thereof, and observed, performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture; yet the defendants, on the 31st March, 1833, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and

Breach.

took, and caused and procured to be drawn and taken, from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream which on those days was left to flow to the said mill was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof; and the defendants, on those days and times, wrongfully and injuriously hindered, denied, molested, and interrupted the plaintiff in the use of the said mill-house, mill, and machinery, whereby the plaintiff, during all the time aforesaid, was hindered and prevented from working the said mill, and had lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him from the working of the said mill.

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

The defendants pleaded that they did not wrongfully and injuriously draw and take, or cause and procure to be drawn and taken, from and out of the said stream, the said quantities of the water thereof in the declaration mentioned, or any part thereof, although the residue of the water of the said stream which on the said days was left to flow to the said mill was not sufficient for the due working thereof for the space of twelve hours on any or either of the said days, although no casualty of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof; nor did the defendants wrongfully and injuriously hinder, deny, molest, or interrupt the plaintiff in the use of the said mill-house, mill, or machinery, in manner and form as the plaintiff had above alleged—concluding to the country.

Plea.

The cause was tried before Alderson, B., at the last Summer Assizes at Exeter. It was admitted on the part

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

of the plaintiff that no act had been done by the defendants, since the date of the indenture, to divert or in any manner to lessen the quantity of water in the stream in question. It appeared from the evidence on the part of the defendants, that, at the time of the grant of the lease to the plaintiff, and for a long time before, water had been abstracted from the stream by eight different outlets—six of them (called ox-eyes) for the supply of private individuals, one to a neighbouring mill, called Meavy Mill, under the provisions of the 27 Eliz. c. 20, and another, under the 5 Geo. 4, c. 49, for the supply of the victualling office at Cremill Point. Of the private supplies, one had existed for upwards of one hundred and eighty years, the party paying to the corporation 1*l.* 1*s.* annually; two for upwards of one hundred years, without charge; another for a somewhat shorter period; other two to the proprietors of certain tan-yards in the neighbourhood of Plymouth, in consideration of the annual payments of 10*l.* 10*s.* and 6*l.* 6*s.* The cut to Meavy Mill, which was mentioned in the recital of the lease, existed long before the time of the passing of

43 Eliz. c. 20.

the 43 Eliz. c. 20, by which power was given to the mayor and commonalty of Plymouth, and their successors, to dig a ditch or trench of certain dimensions over all grounds lying between the town of Plymouth and the river Mew, alias Meavy, for the convenient or necessary conveying the same river to the said town: and the statute contained a proviso "that nothing in the said act should extend to give liberty to bring the said water, or any part thereof, out of its antient course, unless every such person and persons as were owners of any mill or mills situate and standing upon or near the said river Mew or Meavy should first be compounded with, if the said mill by the bringing of the said water, or any part thereof, into the said town

5 Geo. 4, c. 49.

of Plymouth, be impaired or injured." The supply to the victualling office at Cremill Point was made under the authority of the statute 5 Geo. 4, c. 49. The 1st section

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

of that act—after reciting that "a full and adequate supply of water might be afforded to the said victualling establishment at Cremill Point, and also to the Royal Naval Hospital at East Stonehouse, from the said trench or leat, and the mayor and commonalty were willing to furnish the same; but, in order thereto, it was expedient that powers should be given for enlarging and deepening the said trench or leat, and cleansing and repairing the bed and banks thereof, and for making, constructing, and establishing dams and reservoirs, and laying down pipes or tunnels, and doing all other necessary acts, and making all needful works, and also for entering into, taking, and purchasing lands and grounds for that purpose; and that the powers of the said recited act [27 Eliz. c. 20] were not sufficient for preserving the water in the said trench or leat, and preventing nuisances and annoyances therein, and further provisions were required for that purpose, and for securing a constant supply of water to the said town of Plymouth, for the use of the inhabitants thereof, and the ships and vessels resorting thereto, as well as to the said victualling establishment at Cremill Point, and Naval Hospital aforesaid"—impowered the commissioners for victualling the navy to construct a reservoir for receiving and keeping, and pipes for the conveyance of water for the victualling establishment at Cremill Point and the Naval Hospital. The 3rd section enacts, "that, when the said reservoir and other works thereinbefore mentioned, or such of them as should be sufficient for the purpose, should be completed, the said commissioners should give notice thereof to the said mayor and commonalty, and should require them to furnish the same with water; and from thenceforth the said mayor and commonalty should, and they were thereby required, to convey from the said stream or leat, by a sluice or such other ways and means as they might judge proper, a supply equal to four hundred tuns daily of pure wholesome fresh water into the said re-

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

servoir of the said commissioners, to be from thence conveyed and apportioned and distributed among the different departments of the said victualling establishment at Cremill Point and the Naval Hospital aforesaid, in such manner as the said commissioners should think fit; the said quantity of water to be supplied in constant currents to the full diameter of the bore of the pipe or pipes, when the said pipes lie in an horizontal position (inevitable accidents by breaking of the pipes, inclemency of weather, or during the necessary repair of the pipes respectively only excepted); in consideration whereof the said mayor and commonalty, and their successors, should be entitled to and should have and receive a net annual rent or sum of 250*l.*" &c.

It was proved, that, at times the supply of water was insufficient for the due working of the plaintiff's mill for twelve hours a day: and it was admitted on the part of the plaintiff that the number of pipes or outlets to take water from the stream remained as at the date of the lease.

The learned judge expressed an opinion that the covenant for quiet enjoyment in the indenture declared upon, was confined to acts done by the defendants since the date of the grant, and did not extend to omissions on their part to procure for the plaintiff any given supply of water: and he ultimately left it to the jury to say whether or not the supply had been diminished by any act of the defendants since the execution of the lease. The jury having found for the defendants—

Sir *W. Follett*, in Michaelmas Term last, obtained a rule nisi for a nonsuit, on the ground that, the defendants having done no act since the execution of the lease to disturb the plaintiff in the enjoyment of the mill and stream, there had been no breach of the covenant for quiet enjoyment.

Wilde, Serjeant, *Erle*, and *Moody*, shewed cause.—The legal effect of the indenture in question is, a demise by the

corporation of Plymouth to the plaintiff of the mill together with so much water as will suffice for the due working of the mill for the space of twelve hours at least each day; for, "every exception is the act and words of the lessor, grantor, &c., and therefore shall be taken strictè against him"—Comyns's Digest, *Fait*, (E 9.): and "an exception out of an exception leaves the thing unexcepted"—Id. (E 7.)." "So, words added to an exception may qualify the force of the words, and explain the intent of the exception; as, if a man leases land, except his wood, osier, oak, ash, and crab-trees, &c., the soil is not excepted"—Id. (E 8). Here, the exception, without the subsequent proviso, would have the effect of permitting the grantors to deprive the grantee of every drop of water, and would therefore avoid the grant. In *Bowler* v. *Woolley*, 15 East, 444, where a vendor conveyed to a purchaser in fee a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the said lands and hereditaments, with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains &c. necessary for working the coal, except as to such lands as lay within one hundred and fifty yards of the messuage and buildings, and except any homestead: it was held that the vendor thereby reserved to himself the right to dig coals under the messuage, buildings, homestead, and within one hundred and fifty yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains within one hundred and fifty yards of the messuage or buildings, or within the homestead. So, in *Wymer* v. *Kemble*, 6 B. & C. 479, 9 D. & R. 511, Lord Tenterden held that the proviso in the 6 Geo. 4, c. 16, s. 108, that "no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

fair creditors," limited to creditors having security the exception in favour of executions levied before the bankruptcy.

It is admitted or proved that the supply of water to the plaintiff's mill was not sufficient for the due working of it for the stipulated number of hours; and that water had been withdrawn from the leat or stream for the supply of the government office at Cremill Point, and of certain individuals, inhabitants of Plymouth and others; and that these supplies were made with the consent, privity, and procurement, and for the profit of the defendants—whether prior or subsequent to the date of the demise to the present plaintiff, makes no difference; it is equally a breach of the covenant for quiet enjoyment. The supply to the victualling office, though regulated by an act of parliament, does not stand upon a footing different from the other contracts. In legal effect, the 5 Geo. 4, c. 49, must be taken to be a private act. It is nothing more than a contract between the government and the mayor and corporation of Plymouth, sanctioned by an act of parliament. In *The King* v. *Toms*, 1 Doug. 401, where it was held that the parochial assessments for the vicar of St. Michael's in Coventry, established by the 19 Geo. 3, c. 60, were not rateable to the poor, Lord Mansfield said: "This is in the nature of a private act of parliament, where the legislature only lends its aid to the agreement of the parties, in order to render it effectual, where any public reason stands in the way." In *Brett* v. *Beales*, M. & M. 421, it was ruled by Lord Tenterden that an act of parliament private in its nature, is not made admissible in evidence against strangers, by a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded." *Hornby* v. *Houlditch*, 1 T. R. 93, n. (*a*), and *Lucy* v. *Levington*, 1 Vent. 176, are to the same effect. It behoved the defendants, before they entered into this

contract with the plaintiff, to see that they were in a condition to carry it into effect: it is clearly no answer for them to say that they have been prevented from performing their engagement with the plaintiff, by reason of a diminution of water occasioned by grants made by them to other persons before the date of the plaintiff's grant.

In order to ascertain whether or not the breach is well assigned, and is made out by the evidence, it is only necessary to see whether, in the words of the covenant, the water has been withdrawn by persons rightfully claiming by, through, under, or in trust for the defendants, their successors or assigns, or by their, any or either of their acts, means, consent, default, privity, or procurement. In the case of a covenant for quiet enjoyment entered into by the vendor of an estate, a disturbance by one claiming under an incumbrance created prior to the date of the conveyance to the purchaser, would clearly give the latter a right of action on the covenant. In Bacon's Abridgment, *Covenant*, (I), it is laid down, that, "if A. covenants to permit B., his heirs and assigns, to take and enjoy the rents, issues, and profits of certain lands, and in an action of covenant the plaintiff assigns for breach that A. took the profits, and non permisset B. to enjoy &c.; this breach is well assigned, for the taking of the profits by A. is a special disturbance." So, if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it—*Andrews* v. *Paradise*, 8 Mod. 318. So, an action on a covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity—*Morris* v. *Edgington*, 3 Taunt. 25. The defendants in the present case cannot, therefore, be permitted to set up prior grants in excuse for the breach of their covenant that the plaintiff should quietly enjoy the premises granted to him.

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

Sir *W. Follett*, *Crowder*, *Rowe*, and *Butt*, in support of the rule.—The question is, whether or not there has been any breach on the part of the defendants of this specific covenant for quiet enjoyment. The corporation were before the date of the lease bound, by the acts of parliament recited in the lease, and which, being public acts, are binding on every one, to allow certain quantities of water to flow to the Meavy Mill and to the victualling office at Cremill Point. They were also bound, by contracts entered into prior to the date of the grant to the plaintiff, to afford certain supplies to individuals at Plymouth and its neighbourhood. And it is admitted that no contracts have been since made by them, nor any act done by them, tending to diminish the quantity of water flowing in the leat. It may be conceded that an exception of after-grants would render the deed void, but for the subsequent proviso. It may also be conceded, that, if the defendants could be shewn to have done any act, since the execution of the lease to the plaintiff, to reduce the flow of water below a twelve hours' daily supply for the plaintiff's mill, this action might be maintained. The proper construction of the demise, taking it with the exception and proviso, is, that, subject to the existing contracts, the plaintiff shall have sufficient water for the due working of his mill for twelve hours daily. The breach assigned, is, that the defendants, subsequently to the time of the grant, wrongfully and injuriously drew and took, and caused and procured to be drawn and taken from and out of the said stream divers large quantities of the water thereof, although the residue left to flow to the mill was not sufficient for the due working thereof for twelve hours a day. The proof at the trial was, that no act whatever was done in respect of the premises, since the date of the lease, either by the defendants or by any person claiming under them, in respect of contracts entered into since that period. There is therefore clearly no breach of the covenant for quiet

enjoyment. If any action at all would lie under the circumstances, it would be an action on the case for a false description of the premises to be granted, on the covenant for the sufficiency of the supply; not on the covenant for quiet enjoyment.

It may be (for, there was no evidence to the contrary,) that, but for the supplies to the victualling office and to the Meavy Mill, under the 5 Geo. 4, c. 49, and the 27 Eliz. c. 20, sufficient water would have been left to satisfy the plaintiff. The supply to the Meavy Mill is by title paramount; and that to the victualling office is granted for the use of the public, under the provisions of an act of parliament. It is said, that, although regulated by an act of parliament, the supply to the victualling office is in point of fact made under a mere contract between the defendants and government; for that, according to the authority of *The King* v. *Toms*, *Brett* v. *Beales*, and other cases, the declaration in an act of parliament of this nature, that it shall be deemed and taken to be a public act, means only that the courts shall take judicial notice of it, without its being pleaded. In *Beaumont* v. *Mountain*, 4 M. & Scott, 177, 10 Bing. 404, where a question arose as to the effect of such a clause in an act for the regulation of the affairs of an insurance company, which contained a clause enabling the company to sue and be sued in the name of their chairman, Tindal, C. J., said: "It appears to me that we may determine this case without disturbing the decision of Lord Tenterden in *Brett* v. *Beales*. The legislature provides that the act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded. The question therefore is, whether, on a matter of law, we are not bound to obey this direction, and to take judicial notice of the act. Whether or not the present plaintiff has a right to sue as chairman of the company, is a mere matter of law: and, upon the words

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

of the act, I think we are bound to say that he is entitled so to sue." And Alderson, J., said: "This case may be decided without at all breaking in upon the ruling of Lord Tenterden in *Brett* v. *Beales*. There, the act of parliament was sought to be used for the purpose of proving certain facts recited in it; here, the act is used for the purpose of the law only." So, here, the act of parliament relating to the supply to the victualling office was offered as matter of law: it was not offered in evidence to shew a contract between the defendants and government, but to shew that by a positive law the defendants were bound to furnish to the victualling office a certain daily supply of water from the stream in question. With respect to the outlet to the Meavy Mill, the proprietors did not take under a grant from the corporation, but by title paramount. An eviction by title paramount is not breach of the covenant for quiet enjoyment—*Browning* v. *Wright*, 2 Bos. & Pul. 13, *Merrill* v. *Frame*, 4 Taunt. 329, *Hobson* v. *Middleton*, 6 B. & C. 295, 9 D. & R. 247, *Woodhouse* v. *Jenkins*, 2 M. & Scott, 599, 9 Bing. 431. One who takes with notice of an incumbrance, is bound by it—*Ogilvie* v. *Foljambe*, 3 Meriv. 65.

The covenant for quiet enjoyment and the covenant for title are perfectly distinguishable. Lord Ellenborough says, in *Howell* v. *Richards*, 16 East, 642: "The covenant *for title* and the covenant *for right to convey*, are indeed what is somewhat improperly called synonimous covenants; they are, however, connected covenants generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which

he purports to convey, viz. in this case an indefeasible estate in fee-simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbance thereupon." If the plaintiff meant to guard against defects of title, he should have required an express covenant for that purpose—*Pickett* v. *Loggan*, 14 Ves. 215.

TINDAL, C. J.—This is an action on a covenant for the quiet enjoyment of a mill and the use of a stream described in an indenture of lease. On the part of the defendants it is objected that the subject-matter in respect of which the plaintiff sues did not pass by the grant, or that, if it did, on the breach as assigned, and the evidence given at the trial, the plaintiff is out of court. The questions, therefore, which we are called upon to consider, are two—first, whether the stream or any specific part of the stream for the abstraction of the water from which the present action is brought was demised by the lease—secondly, whether there has in point of fact been any breach of the covenant for quiet enjoyment.

The property demised is in the lease described as "a certain mill-house and mill used for the grinding of corn and grain, commonly called or known by the name of the Higher Grist Mill, situate, &c., with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other waterworks therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, benefit of grinding corn and grain, and all manner of other rights, privileges, advantages, easements, profits, commodities, and appurtenances whatsoever to the said mill-house, mill, and premises belonging or in any wise appertaining." If the description had gone no further, I should have had no

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

hesitation in saying that the intention of the parties was, to pass not only the mill and machinery, but also the use of the stream of water running or flowing within the limits expressed in the lease, as the stream flowed at the time of the making of the lease; and, if so, inasmuch as it is admitted that nothing has been done by the defendants since the date of the lease to deteriorate or divert or obstruct the stream, that the plaintiff would have no just right of action. But it is contended on the part of the plaintiff that the subsequent exception and proviso shew clearly that the understanding and intention of the parties was, to grant a sufficient supply of water for the due working of the mill for twelve hours at least each day. The plaintiff, therefore, is bound to shew that some stipulated quantity of water has been distinctly demised to him, otherwise he fails to establish any breach of the covenant entered into by the defendants. The exception is as follows :—" Excepting and always reserving out of the said demise and grant, unto the defendants, their successors and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of Plymouth, and all such bodies politic and corporate, officers and departments in his majesty's service having establishments within or near to the said borough, or other person or persons whomsoever as the defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat." If that exception were to be taken alone, it would no doubt have been void, as being repugnant to and inconsistent with the grant: for it would enable the grantors to take away the whole of that which was the substance of the grant. Lord Coke (Co. Litt. 47. a.) notes " a diversity between an exception (which is ever of part of the thing granted and of a thing in esse) for which, exceptis,

salvo, præter, and the like, be apt words, and a reservation, which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised." Strictly speaking, therefore, that which follows is more properly the subject-matter of the exception:—"Provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted; times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted." The object of this proviso was, to restrain the defendants from doing any act to diminish the supply of water below the quantity that should be necessary for the proper working of the mill during the stipulated number of hours. No fraud has been practised. Both parties well knew the state of facts. According to the just and proper construction of this indenture, it appears to me that the defendants have not stipulated for any absolute grant or demise of a supply of water equal to twelve hours' working of the mill, but merely that they shall not by entering into any new contracts with other persons reduce the power of the stream below that standard. The habendum is in these words:—"To have and to hold the said mill, mill-house, &c., with the use of the water running to the said mill, and the waterworks thereon, and all and singular other the premises in the said indenture before mentioned and described, and thereby demised, or intended so to be, with their and every of their customs, liberties, privileges, advantages, members, and appurtenances whatsoever, except as before excepted, unto the plaintiff, his executors, administrators, and assigns, from the 24th June, 1832, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended." A mere reduction in the amount of the daily

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

supply of water affords no ground of action upon this indenture, as that does not constitute the subject-matter of the demise.

The second question is, whether or not there has in point of fact been any breach of the defendants' covenant for quiet enjoyment. That covenant is in these terms:—"that the plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements thereinbefore contained by him and them to be observed and performed, should and lawfully might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said mill-house, mill, water-works, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatever of or by the said M. Brodrick, her heirs, executors, administrators, and assigns, or of or by the defendants, their successors or assigns, or any other person or persons whomsoever rightfully claiming or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement." Three particular classes of acts are guarded against by this covenant—first, the acts of the lessors themselves—secondly, the acts of persons claiming or to claim by, through, under, or in trust for them—thirdly, interruptions occasioned by the acts, means, consent, default, privity, or procurement of the defendants. The breach assigned is, "that, though the plaintiff had always, from the time of the making the said indenture hitherto, well and truly paid the said rent by the said indenture reserved on the days and in the manner in the said indenture appointed for payment thereof, and observed, performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the

tenor and effect, true intent and meaning of the said indenture, yet the defendants, on the 31st March, 1833, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and took, and caused and procured to be drawn and taken from and out of the said stream divers large quantities of the water thereof, although the residue of the water of the said stream which on those days was left to flow to the said mill was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, or any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof; and the defendants on those days and times wrongfully and injuriously hindered, denied, molested, and interrupted the plaintiff in the use of the said mill-house, mill, and machinery; whereby the plaintiff during all the time aforesaid was hindered and prevented from working the said mill, and had lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him from the working of the said mill." The evidence given at the trial was, not that the defendants had done, or caused or procured to be done, since the execution of the indenture, any act or thing tending to the diminution of the supply of water to the plaintiff's mill; but that certain persons under prior grants took the water, and thereby the quantity of water flowing to the plaintiff's mill was rendered insufficient for twelve hours' working daily. It appears to me that the only fit breach to meet such a state of circumstances would be, that the acts complained of were done by persons claiming under the defendants. To shew that the acts in question were done with the consent of the defendants some acquiescence of a date subsequent to the time of the making of the covenant must be made to appear. All the books agree in that conclusion. In

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

Comyns's Digest, *Pleader*, (2 V. 2), it is said: "The breach ought to be co-extensive with the import and effect of the covenant. If it assigns for breach disturbance &c. by a stranger, it must shew that it was lawful, and how."

It is unnecessary for us to consider the effect of the claims under the authority of the two acts of parliament that have been adverted to—whether or not they bind the parties to this deed; we being of opinion, on the grounds above stated, that this rule ought to be made absolute.

PARK, J., concurred.

BOSANQUET, J.—The two principal questions that have arisen in this case, are—first, upon the true construction of the indenture of demise from the defendants to the plaintiff—secondly, upon the mode in which the breach is assigned in the declaration. Of these two questions, the first, relating as it does to the rights of the parties, is the most material: the second is a mere formal objection.

On the part of the plaintiff it is contended, that the whole effect of the instrument, taking the demise, the exception, and the proviso together, is a demise of a sufficient quantity of water for the due working of the mill for the space of twelve hours in each day of the term. That, however, is not I think the proper construction of the deed. The demise is, of the mill, with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench within certain limits. Then comes the exception, "reserving out of the said demise and grant, unto the defendants, their successors and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the defendants as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of Plymouth, and all such bodies politic and corporate, offi-

cers and departments in his majesty's service, having establishments within or near to the said borough, or other person or persons whomsoever as the defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from the said stream or leat." Now, the effect of this exception, had it stopped here, would be so entirely derogatory to the grant or demise as to destroy it altogether; because it gives the grantors the power of resuming the whole. But then comes the proviso—"provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted; times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted." To what was that proviso intended to apply? It appears to me that it can only be taken to apply as a limit to acts *to be* done in future—that the defendants were not to be at liberty, by any subequent contract for the supply of other persons with water from the stream, to take away such a quantity of water as would reduce the supply to the plaintiff's mill below the stipulated quantity. If the stream was insufficient at the date of the grant, or has since become insufficient from natural causes, to afford the twelve hours' supply, the demise does not amount to an engagement that there shall at all events be a supply to that extent: and, if this be the true construction of the deed, there is an end of the plaintiff's claim.

If the construction of the deed were doubtful, then the second question would arise—whether or not the plaintiff is entitled to recover in respect of a breach by the defendants of their covenant for quiet enjoyment. On the part of the plaintiff it is contended that he is entitled to complain of acts done, not only by persons claiming by,

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

through, under, or in trust for the defendants, but also by persons claiming under acts as well as voluntary contracts entered into by the defendants, and that persons claiming under such contracts are persons claiming by "the acts, means, consent, default, privity, or procurement" of the defendants. It is unnecessary to enter upon a consideration of the effect of the acts of parliament under which certain of the supplies were granted. It is enough to say that other contracts have been entered into by the corporation with other individuals under which water has been drawn from the stream; and if any one of those persons has been improperly supplied, and the quantity of water flowing to the plaintiff's mill thereby reduced below the supply contracted for by the proviso, the plaintiff would be entitled to recover, supposing the indenture to operate as a demise of a twelve hours' supply, and the breach of the covenant for quiet enjoyment is well assigned. The covenant is, "that the said plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements hereinbefore contained by him and them to be observed and performed, should and lawfully might peaceably and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, water-works, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever of or by the said Mary Brodrick, her heirs, executors, administrators, and assigns, or of or by the defendants, their successors or assigns, or any other person or persons whomsoever rightfully claiming or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement." How is the breach assigned? Not that certain persons claiming under contracts entered into prior to the

date of the demise to the plaintiff, and by the acts, means, consent, default, privity, or procurement of the defendants, disturbed the plaintiff in the enjoyment of the premises; but that "the defendants, on the 31st March, 1833, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and took, and caused and procured to be drawn and taken from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream, which on those days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof; and the defendants, on those days and times, wrongfully and injuriously hindered, denied, molested, and interrupted the plaintiff in the use of the said mill-house, mill, and machinery; whereby the plaintiff during all the time aforesaid was hindered and prevented from working the said mill, and had lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him from the working of the said mill." It is perfectly clear, upon the evidence given at the trial, that nothing has been done since the execution of the lease to diminish the supply of water to the plaintiff's mill, and yet the breach alleges a diminution caused and procured by the acts of the defendants. It appears to me that this form of breach is not at all adapted to meet the plaintiff's complaint. Had it been intended to shew that the proper supply had been diminished by acts done or contracts entered into by the defendants before the date of the indenture, the breach should have been framed differently. I am therefore of opinion that the rule for entering a nonsuit must be made absolute.

1837.

BLATCHFORD v. The Mayor of PLYMOUTH.

COLTMAN, J.—It would be enough to decide this cause upon the last point, viz. that the breach is not properly assigned; for, the alleged disturbance was proved not to have been occasioned by any act of the parties charged with having committed the breach. But, inasmuch as that point leaves untouched the substantial question that affects the rights of the parties, we think it right to express our opinion upon that also. The contract which the plaintiff contends that the defendants have entered into is one which they were not very likely to enter into. At the time of the demise, the defendants were already bound by contracts previously entered into by them to supply certain places and persons with water from the stream in question. The argument on the part of the plaintiff supposes that the defendants were willing to abandon all these prior contracts for the purpose of securing to him a certain diurnal supply. That is not very probable. But we cannot reason upon probabilities: we must look only to the words of the deed. What was the subject-matter of the grant? The mill and premises with the use of the stream, without any stipulation for any particular quantity. Now, it is a clear and undoubted principle of law that the words of an exception or proviso cannot enlarge the grant; they can only limit or explain it. The deed is certainly very inartificially framed. But I cannot but think that the exception and proviso were merely intended to restrain the defendants from entering into any future contracts that might derogate from the grant to the plaintiff. The habendum refers to "the mill, mill-house, &c., with the use of the water running to the said mill, and the water-works thereon," &c. The grantors used these words with reference to the then existing state of things. And, as nothing has since been done by them to alter that state of things, it seems to me that the plaintiff has got all he was entitled to under the grant.

Rule absolute.

1837.

GOWER and Others *v.* VON DADELSZEN and Another.

Friday, April 28th.

THE declaration stated that it was mutually agreed by and between the plaintiffs and defendants that the plaintiffs should sell to the defendants, who should buy of and from the plaintiffs, a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel Fortuna, and which vessel was then on her voyage from Gallipoli to Falmouth or Plymouth (the said cargo consisting of L. R. 240 casks, containing 901 salmes and 9 pignatelles), at 54*l.* per imperial ton of 7½ salmes, which amounted in the whole to a large sum of money, to wit, 6,755*l.* 17*s.* 2*d.*, payable by cash, less 2½ per cent. discount, and which discount then amounted to a large sum of money, to wit, 168*l.* 18*s.* 5*d.*, on delivery of bill of lading on her arrival at Plymouth or Falmouth, to either of which ports the plaintiffs agreed to pay freight, insurance, and gratuity, &c. &c.; that, after the making of the said agreement and promise respectively, and before the commencement of this suit, to wit, on the 4th March, 1836, the said vessel called the Fortuna arrived on her said voyage from Gallipoli at Plymouth aforesaid, and at the time of such arrival had on board a cargo of good merchantable Gallipoli oil, consisting of L. R. 240 casks, containing 901 salmes and 9 pignatelles, being the said cargo in the said agreement hereinbefore mentioned; whereof the defendants had notice: that, thereupon, and within a short and reasonable time in that behalf after such arrival at Plymouth aforesaid of the said vessel as aforesaid, the plaintiffs tendered and offered to deliver to and leave with the defendants a certain bill of lading of the said cargo, being the bill of lading in the said agreement hereinbefore mentioned, upon the defendants' paying the aforesaid price of the said cargo in manner aforesaid; that the plaintiffs were then ready and willing to pay, and

The plaintiffs declared on a contract for the sale to the defendants of "a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel Fortuna, the said cargo consisting of L R 240 casks, containing 901 salmes and 9 pignatelles, at 54*l.* per imperial ton." The defendants pleaded that the *casks* containing the oil in the agreement and declaration mentioned were not well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement in the declaration mentioned, but, on the contrary, were badly-seasoned and unfit and improper casks for the purpose of containing such oil:—Held, bad; the subject-matter of the contract being the *oil*, not the *casks;* and the defective state of the casks at most going only to a part of the consideration.

1837.

GOWER v. VON DADELSZEN.

did in point of fact pay the said freight, insurance, and gratuity in the said agreement thereinbefore mentioned to be payable by them, and were then ready and willing and offered to the defendants to deliver to them, and requested them to accept and receive, the said cargo at Plymouth aforesaid, upon the defendants' paying to the plaintiffs the aforesaid price thereof, in manner aforesaid, &c.: Breach, that the defendants did not nor would, when so requested as aforesaid, or at any other time, take, accept, or receive the said bill of lading or cargo at Plymouth aforesaid, or direct the said vessel with the said cargo to any one of the ports before mentioned, or pay to the plaintiffs for the same cargo the aforesaid price in manner or with the deduction and discount aforesaid, or any part thereof, but then wholly neglected and refused so to do; whereupon, and after the lapse of a reasonable time in that behalf after such respective offers and refusals as aforesaid, to wit, on the 4th May, 1836, the plaintiffs sold and disposed of the said cargo by public auction, having theretofore, to wit, on, &c., given due notice to the defendants of the plaintiffs' intention so to do, to the best bidders and buyers that could be got for the same, at a much less price than the said price in the said agreement thereinbefore mentioned, deducting therefrom such discount as aforesaid, to wit, for the price and sum of 5,555*l.* 14*s.* 6*d.*, being less than the said price, deducting therefrom such discount as aforesaid, by a certain large sum of money, to wit, 1,032*l.* 4*s.* 4*d.* which last-mentioned sum then became and was thereby wholly lost to the plaintiffs, and they were then necessarily forced and obliged to pay, lay out, and expend, and did pay, lay out, and expend, in and about the unloading, selling, and disposing of the said cargo, 266*l.* 9*s.* 9*d.*

Breach.

Seventh plea.

The defendants pleaded (seventhly), that the said casks containing the said oil in the said agreement and declaration mentioned, were not at the time of the making of the said agreement and promise in the declaration mentioned,

or at the time of the arrival of the vessel at Plymouth, or at the time the plaintiffs tendered and offered to deliver to and leave with the defendants the said bill of lading of the said cargo as in the declaration mentioned, well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the said agreement in the declaration mentioned, but, on the contrary thereof, were badly seasoned and unfit and improper casks for the purpose of containing such oil as in the said agreement mentioned; wherefore the defendants did not nor would take, accept, or receive the said bill of lading and cargo at Plymouth aforesaid, and did not nor would direct the said vessel, with the said cargo, to any one of the ports in the declaration mentioned, and refused to pay to the plaintiffs for the said cargo the said price, in manner and form as in the declaration alleged.

Special demurrer.

To this plea the plaintiffs demurred specially—assigning for causes, that the defendants had not by the above plea traversed or attempted to put in issue any matter of fact alleged or necessary to be alleged by the plaintiffs in their declaration, but had introduced and attempted to put in issue a matter of fact not alleged or necessary to be alleged, viz. the fact whether the casks containing the said oil were at the several times mentioned in the plea well-seasoned or proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the said agreement, without in their said plea shewing or making it in any way appear that the sufficiency or good quality of the said casks was either expressly or by necessary implication warranted or contracted or agreed for by the plaintiffs in their said agreement in the declaration mentioned; that, if it were the intention of the defendants, by and under their said plea, to set up any usage or custom by which the sellers of Gallipoli oil, under the circumstances in the declaration

1837.

GOWER v. VON DADELSSEN.

mentioned, were or could be held, even without any express agreement to that effect, to warrant or contract or agree for the proper quality and sufficiency of the casks in which the same might be contained, to the purchasers thereof, they should have expressly alleged the existence of such usage or custom, and that the said contract was made with reference and subject thereto; that it was not alleged in the plea, nor did it in any way appear therein, that the oil was at all damaged or rendered unmerchantable, within the meaning of the agreement, by reason of the premises in the plea mentioned, and therefore that the plea offered no justification or excuse for the nonperformance by the defendants of their part of the said contract, and was no answer to the declaration, but was evasive and argumentative, and any issue raised thereon would be immaterial; that the defendants, in their said plea, had not only alleged and attempted to put in issue the insufficiency and bad quality of the casks at the time of the making of the said agreement, but also at the time of the arrival of the said vessel, and of the tender of the cargo, as in the declaration mentioned, although it was quite immaterial and irrelevant to the purposes of this action what the state of the said casks happened to be at any other time than that of the making of the agreement, unless the defendants had alleged in their plea, which they had not done, that the insufficiency and bad quality of the casks at the time of the said arrival, and of the said tender respectively, had been caused and occasioned by the default of the plaintiffs; that the defendants did not in and by their said plea allege that the said casks were intrinsically and in themselves of any less value by reason of their said insufficiency and bad quality than they otherwise would have been, or that the defendants would have sustained any damage in respect thereof by reason of their accepting the cargo; and that the plea did not allege that the defendants elected to avoid or gave to the plaintiffs any notice

of their intention to avoid the said contract or agreement, by reason of the premises in the plea mentioned, or otherwise.

The defendants joined in demurrer.

Crowder, in support of the demurrer.—The contract declared on is a contract for the sale of a cargo of *oil*, warranted to be good merchantable Gallipoli oil, at so much *per ton*. The seventh plea, that the casks containing the oil were not well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, is clearly bad, as tendering an issue that is wholly immaterial. The quality of the casks was not the subject of any warranty, either express or implied. If it were so, and there be any foundation for the argument that will be urged on the other side, the delivery of the quantity of oil contracted for, and of the quality warranted, in one less than the specified number of casks, would have the effect of rescinding the contract. If contracts of this sort are to be vacated upon such grounds, it will be impossible to fulfil any mercantile contract; for, if the absence of a single cask were to have this effect, the same might be said of the deficiency of a hoop, or a decayed stave, in one of the casks. That the plaintiffs tendered oil according to the contract is admitted, as far as the seventh plea is concerned.

Maule, in support of the plea.—The plea is sufficient. The contract declared on is not, as is alleged, a contract for the delivery of a given quantity of oil; but a contract to deliver "a cargo consisting of L R. 240 casks, containing 901 salmes and 9 pipnatelles of oil, at 54*l.* per imperial ton of 7½ salmes." The subject-matter of the contract was the casks as well as the oil. The defendant in answer says that the casks containing the oil were not well-seasoned and proper casks for the purpose of con-

1837.

GOWER v. VON DADELSZEN.

taining good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement in the declaration mentioned, but, on the contrary thereof, were badly seasoned and unfit and improper casks for the purpose of containing such oil as in the agreement mentioned; wherefore the defendants did not nor would take, accept, or receive the said bill of lading and cargo &c. To satisfy the contract, it was necessary that the casks in which the oil was contained should be fit and proper and well-seasoned oil-casks. [*Bosanquet*, J.—Does the objection go to the whole of the contract? Is it not rather, if any thing, the subject of a cross-action?] Every man who sells an article impliedly warrants that it is reasonably fit and proper for the purpose for which it is sold—*Laing* v. *Fidgeon*, 6 Taunt. 108, 4 Camp. 169; *Gray* v. *Cox*, 6 D. & R. 200, 4 B. & C. 108, 1 C. & P. 184, 8 D. & R. 280, 5 B. & C. 458; *Jones* v. *Bright*, 3 M. & P. 155, 5 Bing. 533. [*Bosanquet*, J.—In all those cases, the action was brought by the *purchaser*.] The present is a much stronger case: the fitness of the casks for containing the oil is necessarily implied in the contract.

Crowder, in reply.—The argument as to implied warranties, and the cases referred to, can have no bearing upon the present case. Whether the casks were well or ill seasoned was immaterial; for, it is impossible to read the contract without perceiving that the only subject-matter was the oil. In *Jones* v. *Bright*, the subject-matter of the contract was the copper sheathing, the quality of which was complained of. But, in *Parkinson* v. *Lee*, 2 East, 314 (which has never been over-ruled), it was held, that, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore, if there be

a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), the seller is not answerable, though the goods turn out to be unmerchantable.

TINDAL, C. J.—I am of opinion that the plea in question affords no answer to the plaintiff's right of action. The contract stated in the declaration is, that the plaintiffs should sell to the defendants, and that the defendants should buy of and from the plaintiffs, a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel Fortuna: all that follows is mere matter of description. And unless the defendants are prepared to shew that the oil is not good merchantable Gallipoli oil, they have no defence to the action. The seventh plea admits that the oil is good and merchantable, but takes an exception to the quality of the casks; alleging that the said casks containing the said oil in the said agreement and declaration mentioned were not, at the time of the making of the said agreement and promise in the declaration mentioned, or at the time of the arrival of the vessel at Plymouth, or at the time the plaintiffs tendered and offered to deliver to and leave with the defendants the said bill of lading of the said cargo as in the declaration mentioned, well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the said agreement in the declaration mentioned, but, on the contrary thereof, were badly seasoned and unfit and improper casks for the purpose of containing such oil as in the said agreement mentioned. If this were a good plea, it is evident that the slightest possible imperfection in a single cask, the least variation from the state of well-conditioned casks, would sustain the issue, and yet the oil itself, the subject-matter of the contract, might be perfectly un-

1837.

GOWER v. VON DADELSEN.

deteriorated. It is possible to conceive that the article contracted to be sold might be rendered unmerchantable by the ill-conditioned state of the packages or vessels in which it is contained: for instance, a cask or hamper of wine in bottles might be so badly corked that the wine, though originally good, might turn out to be worthless; but in that case the plea would go on to state, that, in consequence of the improper corking, the wine was rendered unmerchantable. Here, the plea takes issue on that which is merely a part of the description of the thing contracted to be sold, and does not aver that the article itself is unmerchantable. I therefore think the plaintiffs are entitled to judgment.

PARK, J.—I am of the same opinion. The subject-matter of the sale was a cargo of good merchantable Gallipoli oil, and not, as the defendants' counsel has contended, a sale of two hundred and forty casks, the contents being accessory. It is said that there is at all events an implied warranty that the casks were well-seasoned and proper casks for the conveyance of the oil. That, however, is not so: the casks form no part of the contract; they are a mere adjunct. In *Jones* v. *Bright*, where, as in all the other cases referred to, the complaint was that the article which was the subject of the contract was not of the quality represented, this court recognized the principle before often laid down, that, where a man manufactures an article and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose. But that principle cannot apply here; for, there is no complaint as to the quality of the oil which is the subject-matter of this contract; the plea does not allege that the oil is unmerchantable or deficient either in quantity or quality.

BOSANQUET, J.—I am also of opinion that the seventh plea in this case affords no answer to the action. The

1837.

GOWER v. VON DADELSZEN.

contract stated in the declaration, and admitted by the plea, is, a contract for the sale by the plaintiffs to the defendants of a cargo of good merchantable Gallipoli oil, at so much per ton, and described as contained in two hundred and forty casks. The declaration goes on to state, that, after the making of the agreement and promise, the vessel on board of which the oil was shipped arrived at Plymouth, and at the time of such arrival had on board a cargo of good merchantable Gallipoli oil, consisting of L R 240 casks, containing 901 salmes and 9 pignatelles, being the cargo in the agreement thereinbefore mentioned; that the plaintiffs tendered and were ready to deliver the oil to the defendants; but that the defendants refused to receive or to pay for it. A verdict upon an issue taken upon this plea, finding that some of the casks were defective, clearly would not go to the substance of the contract. Even if all the casks turned out to be defective, and the consequence was a small leakage out of each, without any deterioration of the bulk, that would go only to part of the consideration. Or, suppose a contract for the sale of certain bales of cotton, and the cotton arrived in a perfect condition, but the bales were ragged; it clearly would be no answer to an action for the price of the cotton, that the packages were unsound.

COLTMAN, J.—I agree that the seventh plea is no answer to the action: it does not go to the whole consideration. The contract is for the sale of a quantity of oil; and, supposing it also to include the sale of the casks in which the oil is contained, there being no objection to the quality of the oil, the plea would still be no answer to the action, inasmuch as it goes only to a part of the consideration. Had it been shewn that the oil was deteriorated by reason of the unfitness of the casks, the case might have been different.

Judgment for the plaintiff.

1837.

Friday, April 28th.

The declaration stated that the defendants represented to the plaintiff that certain mortgage deeds and writings had been deposited with W. L. B., one of the defendants, and one J. S.; that one H. R. was desirous of purchasing and taking an assignment from W. L. B. and J. S. of their interest in the said mortgage, for the sum of 500*l.*, and to obtain good bills to that amount to satisfy the said sum; that H. R. requested the plaintiff to accept for his accommodation two bills of exchange to be drawn by H. R. upon the plaintiff each for 250*l.*, payable to the order of H. R., for the purpose of enabling H. R. to negotiate the said bills for his own benefit; that H. R. offered the plaintiff, as a security for the repayment to him of such monies as he might pay upon the said bills, that he H. R. would procure the defendants to undertake to deliver to the plaintiff the said deeds and writings on the payment by him of such bills; that, in consideration of the plaintiff's accepting the said bills for the purpose and on the terms aforesaid, the defendants undertook and promised the plaintiff to deliver the said deeds to him on payment by him of the bills:—Held, that the declaration disclosed a sufficient consideration for the defendants' promise.

TIPPER *v.* BICKNELL and Others.

THE plaintiff declared, that, before the making of the agreement and promise of the defendants thereinafter mentioned, the defendants, on the occasion thereinafter mentioned, represented to the plaintiff that certain mortgage deeds and writings, to wit, &c., &c., had been deposited with certain persons, to wit, W. L. Bicknell (one of the defendants) and Mr. Blewitt; that, before and at the time of the making of the agreement and promise of the defendants next mentioned, H. Rowland the younger was desirous of purchasing and taking an assignment from W. L. Bicknell and Mr. Blewitt of their interest in the said mortgage at and for the sum of 500*l.* to be paid by the said H. Rowland the younger for the same, and to obtain good bills to that amount, in order to satisfy the said sum of 500*l.*; that, thereupon, to wit, on the 6th July, 1832, the said H. Rowland the younger applied to and requested the plaintiff to accept for the accommodation of the said H. Rowland the younger two several bills of exchange to be respectively drawn by the said H. Rowland the younger upon the plaintiff, each for the sum of 250*l.*, and payable respectively to the order of H. Rowland the younger, the one at six months' and the other at twelve months' date, for the purpose of enabling the said H. Rowland the younger to use or negotiate the said bills for his own benefit, that is to say, for the purpose of enabling him to indorse the said bills and deliver the same to the said W. L. Bicknell and Mr. Blewitt for the said sum of 500*l.* to be paid as the consideration for the said assignment by W. L. Bicknell and Mr. Blewitt of their interest in the said last-mentioned mortgage to H. Rowland the

younger; that the said H. Rowland the younger then offered the plaintiff, as a security to him for the repayment to him of such monies as he might pay upon the said bills as the acceptor thereof, that he H. Rowland the younger would cause and procure the defendants to undertake to deliver to the plaintiff the said deeds and writings, on the payment by him of such bills of exchange so to be drawn and accepted as aforesaid; that thereupon the plaintiff consented and was ready and willing to accept such bills of exchange for the purpose and upon the terms aforesaid, and upon such security as aforesaid, such security being of great value, to wit, of the value of 1000*l.*; that thereupon, to wit, on the 6th July, 1832, the said H. Rowland the younger then drew the said bills of exchange, bearing date the day and year last aforesaid, each for the sum of 250*l.*, upon the plaintiff, payable as aforesaid; that the plaintiff then agreed to accept the same for the purposes and upon the terms aforesaid, and upon such security as aforesaid; that H. Rowland the younger then requested the defendants, that, on the plaintiff's accepting the said bills as aforesaid, they the defendants would undertake to deliver to him the said deeds and writings, on the payment by him the plaintiff of the said bills according to the tenor and effect thereof; of all which premises the defendants then had notice, and then represented to the plaintiff that the said deeds and writings had been so deposited as aforesaid; that thereupon, in consideration of the plaintiff's accepting the said bills for the purpose and on the terms aforesaid, the defendants then undertook and promised the plaintiff to deliver to him as such nominee of H. Rowland the younger the said deeds and writings, on the payment by him of the said bills of exchange respectively, according to the tenor and effect thereof. The count then averred, that the plaintiff, confiding in the said undertaking and promise of the defendants, did then accept the said two several bills of exchange for the accommoda-

1837.

TIPPER v. BICKNELL.

1837.

TIPPER v. BICKNELL.

tion of H. Rowland the younger, for the purpose and upon the terms aforesaid, being bills respectively bearing date the said 6th July, 1832, for the payment of 250*l.* each to the order of the said H. Rowland the younger at six and twelve months after date respectively, and then delivered the said bills to H. Rowland the younger, and he then indorsed the same, and delivered the same to W. L. Bicknell and Mr. Blewitt for the purpose and upon the terms aforesaid; which bills respectively became due and payable, according to the tenor and effect thereof, before the commencement of this suit; that he duly paid and satisfied the said bills respectively, to wit, the full amount thereof, as and when the same respectively became due and payable according to the tenor thereof; whereof the defendants, afterwards, and before the commencement of this suit, to wit, on the 10th July, 1833, had notice, and were then and afterwards requested by the plaintiff to deliver to him the said deeds and writings according to their said undertaking and promise; that a reasonable time for so doing had elapsed before the commencement of this suit; yet the defendants had not nor had any or either of them delivered to the plaintiff the said deeds and writings, or any of them, but had wholly neglected and refused so to do, and had therein made default, contrary to their said agreement and promise; by means of which said premises the plaintiff had been and was deprived of the said security for and means of obtaining repayment of the amount of the said bills, and the same, with interest thereon, amounting together to a large sum, to wit, the sum of 600*l.*, was now due and unpaid to the plaintiff, and he had been unable to obtain payment of and was likely to lose the same; and thereby also the plaintiff had lost the benefits he would otherwise have derived from using and employing the monies so paid by him, and had incurred divers expenses, to wit, to the amount of 50*l.*, in endeavouring to obtain the said deeds and writings, and incidental thereto, and was

Breach.

1837.

TIPPER v. BICKNELL.

Special demurrer.

and still is otherwise injured; to the plaintiff's damage of 700*l.*, &c.

To this declaration the defendants demurred specially, assigning for causes—that the plaintiff had not shewn in his declaration any consideration in law for the promise therein alleged to have been made by the defendants; that it did not appear in any way in or by the declaration, that the acceptance of the said bills by the plaintiff in the declaration mentioned was given, or the said bills, or either of them, paid by the plaintiff at the instance of the defendants, or that the defendants in any way assented to the said offer made by H. Rowland the younger of the said deeds and writings in the declaration mentioned as a security to the plaintiff, as in the declaration alleged, or that the plaintiff was induced to accept the said bills, or either of them, by the offer of such security, or by virtue of any application by the defendants to him made so to do, or that the defendants were parties to or in any way assented to the alleged arrangement between the plaintiff and H. Rowland the younger, or that the said deeds, or any or either of them, were or was ever in the possession, custody, or control of the defendants, or that they had at any time any interest therein or in the said mortgage or the said assignment thereof, or in the payment of the said bills, or that the defendants had ever represented to the plaintiff that the said deeds and writings or any of them had ever come to the hands of them the defendants, or had ever been or were in their custody or control; that the said promise in the declaration mentioned was a mere nudum pactum, upon which no action could be sustained; and that the declaration was in other respects defective both in form and substance.

The plaintiff joined in demurrer.

The points marked for argument were as follows:—"The plaintiff will contend that the declaration shews a sufficient consideration for the defendants' promise, that

1837.

TIPPER v. BICKNELL.

is to say, the obligation which the plaintiff imposed on himself by accepting the bills, although all the defendants may not have been thereby benefited; that it was not necessary to allege that the bills were accepted at the defendants' request, as the consideration for their promise was not executed, but concurrent or executing; and that the defendants were responsible to the plaintiff on their absolute engagement to deliver the deeds to him."

Crowder, in support of the demurrer.—The principal question is whether or not a sufficient consideration for the defendants' promise is disclosed on the face of the declaration. The bills were accepted for the accommodation of Rowland, who alone received the benefit. No benefit or advantage appears to have accrued to the defendants, nor has any inconvenience been sustained by the plaintiff on their request. In the note to *Osborne* v. *Rogers*, 1 Wms. Saund. 264, it is said that the declaration should state the service to have been performed at the special instance and request of the party liable. Nothing of the kind appears here. In *Price* v. *Easton*, 4 B. & Ad. 433, 1 N. & M. 303, it was expressly laid down that a count stating a promise to pay a sum of money to the plaintiff, without alleging to whom the promise was made, is sufficient. There, the declaration stated that W. P. owed the plaintiff 13*l.*, and that, in consideration thereof, and that W. P., at the defendant's request, had promised defendant to work for him at certain wages, and also in consideration of W. P. leaving the amount which might be earned by him in the defendants' hands, he the defendant undertook and promised to pay the plaintiff the said sum of 13*l.*: averment, that W. P. performed his part of the agreement: the judgment was arrested, because the plaintiff was a stranger to the consideration.

Stephen, Serjeant, contra, was stopped by court.

1837.

TIPPER v. BICKNELL.

TINDAL, C. J.—Taking the whole declaration together, it amounts to a statement, that, by a simultaneous act, a promise was made by the defendants, that, on the plaintiff's accepting the bills drawn by Rowland, they, the defendants, would deliver up certain deeds when the bills were paid. Where the act of plaintiff and the promise of the defendant take place at the same time, the law does not require, as in the case of a by-gone transaction, that, to make the promise binding, the plaintiff should have acted on the defendant's request. If the plaintiff were suing in respect of a consideration executed at the time of the promise, I agree that it should be shewn that the act was done at the request of the defendants: but I collect from this declaration that all the parties were present together, and that the acceptance of the bills by the plaintiff, and the promise of the defendants to deliver the deeds, was one entire transaction; and consequently I think the declaration discloses a sufficient cause of action, and that the plaintiff is entitled to judgment.

PARK, J.—I also think that this declaration is unexceptionable: the transaction disclosed in it appears to have been one entire transaction between the parties.

BOSANQUET, J.—I think a sufficient consideration appears on the face of this declaration. Rowland wished to get possession of certain deeds which the defendants held, and which they were willing to give up on payment of the plaintiff's acceptances. The bills were accepted by the plaintiff upon Rowland's request, and on his engagement to procure the defendants to deliver up the deeds on the payment of the bills. During this negotiation, the bills were unaccepted. It is averred, that, in consideration of the plaintiff's accepting the bills, the defendants agreed to deliver the deeds when the bills should be paid. The bills were accepted and paid. It seems to me,

1837.

TIPPER v. BICKNELL.

therefore, that there is a sufficient consideration stated for the defendants' promise.

COLTMAN, J.—One argument on the part of the defendants proceeded on the mistaken fact that the plaintiff's acceptance was a mere act of kindness to Rowland, and therefore insufficient to create a consideration for the defendants' promise. That, however, is not the true state of the case; for the plaintiff was, by the defendants' promise to deliver the deeds, induced to accept the bills. The other argument is a misapplication of a legal maxim which relates only to contracts executed. The contract was not executed when the defendants made their promise.

Judgment for the plaintiff.

Saturday, May 6th.

Where a defendant in an ejectment by mortgagee, for the recovery of the possession of the mortgaged premises, pays into court, under the 7 Geo. 2, c. 20, s. 1, the principal and interest, the costs to which he is liable are to be taxed as between party and party.

DOE *d.* CAPPS *v.* CAPPS.

THIS was an action of ejectment by a mortgagee to recover the possession of the mortgaged premises.

A verdict having been found for the plaintiff, the defendant's agent took out a summons calling upon the plaintiff's agent to deliver up all deeds relating to the title of the mortgaged premises, upon payment of the principal and interest for the non-payment of which the action was brought, with costs to be taxed by one of the prothonotaries. The officer, on taxation, having allowed only costs as between party and party—

N. R. Clarke, on a former day in this term, obtained a rule calling upon the defendant to shew cause why the taxation should not be reviewed.—He contended that the costs should have been taxed as between attorney and client, under the statute 7 Geo. 2, c. 20, s. 1, which enacts, that, "where any action of ejectment shall be brought in

any of his majesty's courts of record at Westminster, &c., by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his majesty's courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, if the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, or who shall appear and become defendant or defendants in such action, shall at any time pending such action pay unto such mortgagee or mortgagees, or, in case of his, her, or their refusal, shall bring into the court where such action shall be depending all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose), the monies so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the court may and shall discharge every such mortgagor or defendant of and from the same accordingly; and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or re-convey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings in his, her, or their custody relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor or mortgagors who shall have paid or brought such monies into the court, his, her, or their heirs,

1837.

DOE d. CAPPS v. CAPPS.

executors, or administrators, or to such other person or persons as he, she, or they shall for that purpose nominate or appoint."

Wilde, Serjeant, shewed cause.—It has been the universal practice under this statute to tax the costs as between party and party: "costs to be ascertained" is an expression that is well understood in a court of law; it means, to be ascertained by taxation in the ordinary way. Attempts have been made to recover as damages the extra costs incurred in actions for malicious arrests, and others of the like nature; but without success.

N. R. Clarke, in support of the rule, stated that he had been informed by Mr. Bunce, one of the masters of the court of King's Bench, that the practice there was, to tax costs under the statute, not strictly as between attorney and client, but very *liberally*; and he referred to *Nowell* v. *Roake*, 7 B. & C. 404, where it was held, that, in an action for mesne profits, the plaintiff may recover, by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant: and Lord Tenterden said: "There can be no doubt that the court of error could not award costs to the plaintiff. But the expenses incurred in the court of error were part of the damages sustained by the plaintiff by reason of his having been wrongfully kept out of possession by the act of the defendant; and I think that the jury might reasonably consider the costs between attorney and client as the measure of the damages which he had sustained."

[Mr. Prothonotary *Watlington* reported that the constant course, in this court, was, to tax costs under the 7 Geo. 2, c. 20, s. 1, precisely on the scale here adopted.]

TINDAL, C. J.—Had this been res integra, I must confess I should have felt little hesitation in holding that the

1837.

DOE d. CAPPS v. CAPPS.

mortgagee was entitled to a full and complete indemnity. But, inasmuch as our most experienced officer reports to us that the practice in this court has invariably been to tax the costs under this statute as between party and party, I think we cannot make this rule absolute.

The rest of the court concurring—

Rule discharged.

LINDSAY v. WELLS.

Saturday, May 6th.

The plaintiff described himself in his declaration as "Henry H. Lindsay:—The court refused to set aside the declaration.

Semble, that the 11th and 12th sections of the 3 & 4 Will. 4, c. 42, apply only to the case of a misnomer of *the defendant*.

THIS was an action of assumpsit upon five several bills of exchange and a promissory note. The plaintiff was resident in America, and the action was brought by virtue of a power of attorney in which the plaintiff was styled "Henry H. Lindsay." The defendant having been arrested on a writ of capias issued at the suit of "Henry H. Lindsay," was discharged out of custody, by order of Littledale, J., upon his entering a common appearance. A declaration was afterwards delivered, the plaintiff being also described therein as "Henry H. Lindsay." The defendant thereupon took out a summons to set aside the declaration for irregularity. The judge before whom this summons came on to be heard declining to make any order—

R. Thomas, on a former day, moved for a rule calling upon the plaintiff to shew cause why the declaration should not be set aside for irregularity, or why it should not, at the plaintiff's cost, be amended by the insertion of his full Christian name. He referred to the statute 3 & 4 Will. 4, c. 42, s. 11, which enacts "that no plea in abatement for a misnomer shall be allowed in any personal action; but that, in all cases in which a misnomer would but for this act have been by law pleadable in abatement in

1837.

LINDSAY v. WELLS.

such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit (*a*)."

The court entertained some doubt whether the section referred to was intended to apply to the case of a misnomer of the plaintiff: but a rule nisi was granted.

W. H. Watson now shewed cause.—The defendant does not shew that "Henry H. Lindsay" is not the full and proper name of the plaintiff; the court will therefore assume that it is so. In *Scott* v. *Soans*, 3 East, 11, the defendant's being served by the name of "Jonathan otherwise John Soans" was held to be no cause of demurrer to the declaration; for, non constat that it was not all one Christian name. Besides, here the defendant has not pursued the course pointed out by the statute, supposing it to apply to the case of a misnomer of the plaintiff: he should have applied to amend the declaration, at the plaintiff's cost, by the insertion of the right name, "upon a judge's summons, *founded on an affidavit of the right name.*" The rule must therefore be discharged, with costs.

Thomas, in support of his rule.—The case of *Scott* v. *Soans* has no application. [*Tindal*, C. J.—To entitle you to sustain this rule, you must shew that the application in its favour is warranted by the 11th section of the 3 & 4 Will. 4, c. 42.] That clause is general in its terms: there is nothing in its language to shew that it was intended to

(*a*) See Reg. Gen. Hilary Term, 2 Will. 4, pl. 32.

1837.

LINDSAY v. WELLS.

be confined to the case of a plaintiff. The course, too, pointed out by it has been pursued: a summons was taken out. [*Tindal*, C. J.—To set aside, but not to amend the declaration.] There is nothing unreasonable in requiring a plaintiff to insert his proper name.

TINDAL, C. J.—Standing alone, it might well be doubted whether the 11th section of the 3 & 4 Will. 4, c. 42, did not extend to the case of a misnomer of a plaintiff. But I think the 12th section, which enacts, "that, in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full," and which clearly applies only to the case of a misnomer of the defendant, shews that the 11th also applies only to the case of a defendant. Even supposing the section to apply to the case of a plaintiff, the defendant has not brought himself within it. I therefore think this rule must be discharged with costs.

The rest of the court concurring—

Rule discharged, with costs (*b*).

(*b*) The 3 & 4 Will. 4, c. 42, ss. 11, 12, having abolished pleas of misnomer in personal actions, it has been doubted whether a defendant arrested by a wrong christian name can apply to be discharged on motion (Callum v. Leeson, 2 Dowl. 381, 2 Cr. & M. 406, 4 Tyr. 266); but it has since been decided that he may, if due diligence has not been used, according to the rule of Hilary Term, 2 Will. 4, pl. 32. No advantage, however, can be taken at the trial of a misnomer of the *plaintiff*, though there be a person of the name erroneously used; it being a question of fact who is the real plaintiff (Moody v. Aslatt, 1 C. M. & R. 771, 5 Tyr. 492, 3 Dowl. 486)—Tidd's New Practice, 67.

1837.

Saturday, May 6th.

WYLLIE and Another *v.* PHILLIPPS.

After the issuing but before the service of the writ of summons, the defendant paid *the debt* to the plaintiffs' clerk, who was induced to receive it by the defendant's representation that he would not be thereby exonerated from any costs that might have been incurred. The plaintiffs' attorney, with knowledge of the fact of the debt having been paid, delivered a declaration. A judge at chambers having made an order to stay the proceedings *without* costs—The Court amended it by making it operative *on payment of the costs of the writ.*

THE writ of summons in this case issued on the 18th February, and various ineffectual attempts had been made to serve the defendant. On the 25th, the defendant saw the clerk of the plaintiffs, and offered to pay him the debt. The latter at first refused to receive it, on the ground that the matter had been placed in the hands of his employers' attorney, to whom certain costs might be due: but, on the defendant's assuring him that his receiving the debt would not prejudice his employers' right to demand any costs that might already have been incurred, the clerk consented to take the money. The writ was served on the 26th. The plaintiffs' attorney afterwards wrote to the defendant, threatening to proceed with the action unless the costs of the writ were paid. No notice having been taken of this demand, a declaration was delivered. The defendant thereupon applied to a judge at chambers (Lord Denman, C. J.), who made an order for the stay of the proceedings without costs.

F. Kelly, on a former day, on an affidavit of the above facts, obtained a rule calling upon the defendant to shew cause why this order should not be set aside.

Wilde, Serjeant, shewed cause.—The conclusion to which Lord Denman came was correct. The debt having been paid to an authorized agent of the plaintiffs before the service of the writ of summons, and the attorney being aware of the fact, the declaration at all events should not have been delivered.

Kelly, in support of his rule.—Payment of the debt without the costs is no satisfaction or discharge of the action, unless made to one having authority to settle the

1837.

WYLLIE v. PHILLIPPS.

action, and with full knowledge of all the circumstances. The payment having been made behind the backs of the plaintiffs and their attorney, and to one ignorant of its consequences, the plaintiffs were entitled to proceed for costs.

TINDAL, C. J.—It appears to me that the order of Lord Denman would have been perfectly unexceptionable had it directed a stay of the proceedings on payment of the costs of the writ of summons. Payment of the debt after the issuing of the writ, is no answer to the action. But under the circumstances the plaintiffs ought not to have declared. I therefore think the justice of the case will be best attained by directing an amendment of the order, making it operate a stay of the proceedings on payment of the costs of the writ.

BOSANQUET, J.—The debt having been paid at the time of the service of the writ, the indorsement did not give the defendant the means of availing himself of the rule of Hilary Term, 2 Will. 4, reg. II.

The rest of the court concurring—

Rule accordingly.

HALLIDAY *v.* LAWES.

Saturday, May 6th.

Interlocutory costs may, under the 93rd rule of Hilary Term, 2 Will. 4, be set off against the final costs of the cause, without regard to the attorney's lien.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff. The defendant having been arrested, and having given a bail-bond, a rule nisi was obtained on his behalf, in Hilary Term last, that the bail-bond might be delivered up to be cancelled. That rule was ultimately discharged with costs (vide ante, p. 354), and the costs on that occasion payable to the plaintiff were on the 14th of February last taxed at 15*l*. On the 21st a fiat in bankruptcy issued against the defendant: and, the plaintiff not chusing further to proceed in the

1837.

HALLIDAY v. LAWES.

action, judgment of non-pros. was signed on the 10th March, and the costs thereon taxed at 9*l.*

Atcherley, Serjeant, on a former day, on the part of the plaintiff, obtained a rule calling upon the defendant to shew cause why the taxation of the costs of the non-pros. should not be reviewed, on the ground that the taxation had improperly proceeded in the absence of the plaintiff's attorney [this point was disposed of by the affidavits in answer]; and why the costs due to the plaintiff upon the former rule should not be set off against the defendant's costs of the non-pros.

Wilde, Serjeant, shewed cause.—The 93rd rule of Hilary Term, 2 Will. 4—which provides that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted"—only intended to authorize the setting off of interlocutory against interlocutory costs: the costs to be set off against each other must be of equal degree. Here, the plaintiff might have proceeded to enforce the costs of the rule by attachment. His neglect so to do ought not to be allowed to prejudice the defendant's attorney. In *Doe* d. *Hope* v. *Carter*, 1 Dowl. 269, 1 M. & Scott, 516, 8 Bing. 330, where it was held that interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged is not strictly a condition precedent to ulterior proceedings, the attorney's lien was respected. [*Bosanquet*, J.—In that case, no allusion whatever appears to have been made to the 93rd rule of Hilary, 2 Will. 4.]

Atcherley, Serjeant, in support of his rule.—The meaning of the rule in question clearly is, that the lien of the attorney upon the damages or costs shall attach only upon

1837.

HALLIDAY v. LAWES.

the general result, upon the final balance on the one side or the other. In *Doe* d. *Hope* v. *Carter*, the costs were probably incurred before the rule came into operation. At all events, the point was not presented to the notice of the court.

TINDAL, C. J.—This rule, as to the first branch of it, must be discharged, on the usual terms: but, with respect to the set-off, that part of the rule must I think be made absolute. The 93rd rule of Hilary Term, 2 Will. 4, does in terms admit of the set-off of interlocutory costs against the final costs in the cause: the attorney's lien attaches only on the balance.

The rest of the court concurring—

Rule accordingly (*a*).

(*a*) See Tidd's New Practice, 181, 182.

DOE *d.* DAFFEY and Others *v.* SINCLAIR and Another.

Monday, May 8th.

A defendant who has lain in prison twelve months upon a judgment for nominal damages and costs in an action of ejectment, is entitled to be discharged under the 48 Geo. 3, c. 123, s. 1, notwithstanding the costs exceed 20*l.*

THIS was an action of ejectment. A verdict having been found for the lessors of the plaintiff, damages *one shilling*, costs 40*s.*, the costs of increase were taxed, amounting to 24*5l.* 19*s.*, judgment signed, and the defendants taken in execution for 248*l.* The defendants having been in custody upon this judgment more than twelve months—

Manuel applied for their discharge under the statute 48 Geo. 3, c. 123, s. 1. He cited *Doe* d. *Threlfall* v. *Ward*, 2 M. & Welsby, 65.

Butt shewed cause in the first instance (*a*).—In *Doe* v. *Reynolds*, 10 B. & C. 481, the court of King's Bench held

(*a*) Notice of the intended application had been given, pursuant to the rule of Hilary Term, 2 Will. 4, which provides that "a rule or order for the discharge of a debtor who has been detained in

1837.

Doe d. Daffey v. Sinclair.

that a party in execution for more than twelve months for the costs of an ejectment, exceeding 20*l.*, is not a person in execution upon a judgment for a debt or damages not exceeding 20*l.* within the statute, and therefore not entitled to be discharged out of custody. Lord Tenterden there said: "I am of opinion that this is not a case within the statute. The object of the statute was, to relieve persons in execution upon a judgment for a debt or damages. Here, the defendant is in execution for the costs of an ejectment. The object of a party instituting such a proceeding, is, to recover the possession of the land, and not any debt or damages." That case was not cited in *Doe* d. *Threlfall* v. *Ward.*

TINDAL, C. J.—The words of the statute are to my mind conclusive—"All persons in execution upon any judgment for *any debt or damages* not exceeding the sum of 20*l.*, *exclusive of the costs recovered by such judgment*, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, shall and may, upon his, her, or their application for that purpose in term time, made to some one of his majesty's superior courts of record at Westminster [wherein such judgment shall have been obtained], to the satisfaction of such court, be forthwith discharged out of custody as to such execution, by the rule or order of such court." I think the rule must be made absolute.

The rest of the court concurring—

Rule absolute (*b*).

execution a year for a debt *under* [the words of the statute are *not exceeding*] 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires."

Where an application to discharge a prisoner under the act is successfully opposed on notice, no costs are allowed. Anonymous, 1 Dowl. 537.

(*b*) See accord. Doe v. ——, 1 Dowl. 69. Per Patteson, J.

1837.

POLE, Chairman of the SUN LIFE ASSURANCE SOCIETY, *v.* ROGERS, Chairman of the UNION LIFE OFFICE.

Monday, May 8th.

In an action on a life policy, in which the defendant had obtained a judge's order for the examination upon interrogatories (under the 1 Will. 4, c. 22, s. 4) of witnesses residing at Paris and Boulogne, the court, at the instance of the plaintiff, amended the order by adding to its terms, that the plaintiff be at liberty to cross-examine the witnesses vivâ voce, and the defendant to put additional questions; the cross-examinations and answers to be reduced into writing and returned with the commission.

THIS was an action upon a life policy. At the instance of the defendant, an order had been made by Lord Denman, C. J., for a commission for the examination of witnesses upon interrogatories at Paris and Boulogne, under the statute 1 Will. 4, c. *22*, s. 4 (*a*).

Wilde, Serjeant, on the part of the plaintiff, on a former day, obtained a rule calling upon the defendant to shew cause why the above order should not be amended by adding thereto that the plaintiff might have liberty, by himself, his attorney, or agent, to cross-examine the witnesses vivâ voce, such cross-examination and the answers thereto to be reduced into writing and returned with the commission to one of the secondaries of this court.

R. V. Richards, contra, submitted that the course suggested would entail great expense upon the parties, inasmuch as it would be necessary to send out some profes-

(*a*) Which enacts "that it shall be lawful to and for each of the courts at Westminster, &c., and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, *upon interrogatories or otherwise*, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, *by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination*, as well within the jurisdiction of the court wherein the action shall be depending as without, *and all other matters and circumstances connected with such examination, as may appear reasonable and just.*"

1837.

POLE v. ROGERS.

sional man to conduct the examination; and that the course pointed out by Lord Denman's order was that which was constantly pursued in Chancery.

Wilde, Serjeant, and *W. H. Watson*, in support of the rule.—Cross-examination is a mode of proceeding that is totally inapplicable to the case of an examination upon interrogatories: and this is a case in which it is peculiarly essential that each party should have an opportunity of putting additional questions. The course suggested is by no means new: vivâ voce examinations were not infrequent under the 13 Geo. 3, c. 63, s. 44; and the same course was adopted in *Duckett* v. *Williams*, 1 C. & J. 510, 1 Tyr. 502, 1 Dowl. 291. The latter part of the 4th section of the 1 Will. 4, c. 22, contemplates the possibility of the same mode of examination not being applicable to every case, and gives the court a discretion to direct the manner in which the examination in each case shall be taken.

TINDAL, C. J.—It seems to me that the present application is a very reasonable one. Cross-interrogatories are certainly most unsatisfactory things; and Paris and Boulogne are the very places where the least possible difficulty could be experienced in obtaining proper professional assistance for the proposed examination. Had the place of examination been Nootka Sound, or any other place equally remote from the ordinary haunts of civilization, I must confess I should have felt difficulty in acceding to the application (*b*).

The rest of the court concurring—

Rule absolute—to add to Lord Denman's order, that the plaintiff be at liberty to join in the commission, to cross-examine the witnesses vivâ voce; the defendant to be at liberty to put additional questions; the cross-examina-

(*b*) For the mode of proceeding generally under this statute, see Tidd's New Practice, 484—495.

tions and answers to be reduced into writing and returned with the commission (*c*).

(*c*) The witness refused to submit to the proposed examination; and, in Michaelmas Term, 1 Victoriæ, the court granted a commission in the same terms for the examination of another witness in Bombay, and also a mandamus under the 13 Geo. 3, c. 63, to be acted upon in lieu of the commission should the witness be found to be resident within the jurisdiction of the Supreme Court of Judicature in that presidency.

STALEY *v.* LONG.

Monday, May 8th.

THIS was an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded—first, not guilty—secondly, that the plaintiff was not lawfully possessed of the close—thirdly, a right of way. At the trial, at the last Summer Assizes, a verdict was found for the plaintiff on the first issue, *with one shilling damages;* the second issue was also found for the plaintiff, and the third for the defendant. The postea having been delivered to the plaintiff—

In trespass for breaking and entering the plaintiff's close, the defendant pleaded—first, not guilty—secondly, that the plaintiff was not lawfully possessed of the close—thirdly, a right of way. The jury found for the plaintiff on the first and second issues, *damages* 1*s.*, and for the defendant on the third. The associate having delivered the postea to the plaintiff—The Court ordered it to be returned; the defendant having succeeded on the only real issue, and therefore being entitled to the general costs in the cause, and the award of damages on the first and second issues being clearly a mere slip.

Talfourd, Serjeant, on a former day in this term, obtained a rule, on behalf of the defendant, calling upon the plaintiff to shew cause why the postea should not be delivered to the defendant, or why it should not be amended by striking out the damages found upon the first issue, and why the prothonotary should not be directed to tax the defendant the general costs of the cause.

Ludlow, Serjeant, shewed cause.—The plaintiff having recovered (whether erroneously or not, it is too late now to inquire) damages, he is clearly entitled to the possession of the postea. [*Tindal*, C. J.—The plaintiff certainly ought not to have had damages found for him, the defendant having established the right of way set up.] The court has no means now of considering whether or not the

1837.

STALEY v. LONG.

damages were rightly found: the application for that purpose should have been made within the first four days of the term succeeding the trial; the finding of the jury cannot at this distance of time be thus summarily erased. The defendant will doubtless be entitled to the costs of the issue found for him: but the general costs of the cause must fall to the plaintiff—*Smith* v. *Edwards*, 4 Dowl. 621. The defendant is clearly not entitled to the relief prayed.

Talfourd, Sarjeant, in support of his rule, was stopped by the court.

TINDAL, C. J.—The plaintiff has recovered a verdict on the first and second issues; and the defendant has recovered a verdict on the third issue, which involved the only substantial question between the parties—viz. on the right of way. All the burthen of costs would necessarily be incurred upon the third issue: and one cannot but surmise that the defendant will be the party who will be ultimately entitled to receive costs. Such being the case, it may well be supposed that the plaintiff would be slow in proceeding to tax. The jury ought not to have given any damages. But, inasmuch as they did give the plaintiff nominal damages, the associate thinking him to be therefore entitled to the postea, it has been delivered to him. The defendant, however, being the party to proceed with the taxation, he is the party in whose custody the postea should be. I therefore think the rule must be made absolute for the delivery back of the postea to the associate.

PARK, J., concurred.

BOSANQUET, J.—The defendant is clearly the party that has substantially succeeded. The plaintiff will of course be entitled to deduct from the general costs of the cause

1837.

STALEY v. LONG.

the costs of the issues raised upon the two pleas unnecessarily put upon the record: but he was not entitled to the postea.

COLTMAN, J.—The party entitled to the postea, is, the successful party, the party to whom the general costs of the cause are to go: and in this case that must be the defendant, who has obtained a verdict upon the only real question at issue in the cause.

Rule absolute accordingly (*a*).

(*a*) See Knight v. Woore, ante, 360.

OVERTON *v.* SWETTENHAM and Another.

Monday, May 8th.

The sheriff's return to a writ of false judgment to remove proceedings from a Welsh county court, consisting of a mere copy of the minute of proceedings entered shortly—the court remanded the transcript, that it might be amended, by more fully setting forth the proceedings, or that the sheriff might certify the course and practice of the county court, so as to shew what was meant by the several entries.

THIS was an action of debt brought by the plaintiffs below in the county court of Denbighshire to recover from the defendant the sum of 1*l.* 19*s.* 11*d.* At the trial a verdict was found for the plaintiff, and leave was reserved to the defendant to move that the verdict might be set aside and a nonsuit entered, on the ground that it did not appear that the cause of action arose within the jurisdiction of the county court. The motion was afterwards made, and refused. The defendant thereupon brought a writ of false judgment, the sheriff's return to which was as follows:—

"At the full county court of the county of Denbigh, holden, &c., before Henry Hert and Peter Pert, Henry Henn and David Fenn, four lawful knights of the same county, William Swettenham and Robert Evans Davies complain against Thomas Overton in a plea of debt for 39*s.* 11*d.*

"11th Nov. 1835. Mr. E. Jones appears for the defendant.

"6th Jan. 1836. Declaration—did grant to pay.

1837.

OVERTON v. SWETTENHAM.

"13th March, 1836. Motion for particulars.

"25th May, 1836. Particulars filed.

"22nd June, 1836. Defendant moved for further time to plead, and a week's time was granted.

"30th June, 1836. Plea—general issue, filed with notice of set-off for 2*l.* 2*s.* for work and labour, care, diligence, attendance, and journies.

"20th July, 1836. Similiter.

"At the ninth county court of the county of Denbigh, holden at Denbigh on the 12th October, 1836, before &c., cause tried, verdict for plaintiffs, damages 1*l.* 10*s.*, but with permission for defendant to move the court on the 7th December next for leave to set aside the verdict and enter a nonsuit; or, if the sheriff has no legal right to enter such nonsuit, then that the defendant may move the court of King's Bench in next term to set aside the verdict and enter a nonsuit.

"At the eleventh county court of the county of Denbigh, holden at Denbigh on the 7th of December, 1836, before &c.

"Rule for nonsuit refused.

"19th Dec. 1836. Costs taxed at - -	£12	9	6
"Damages - - -	1	10	0
	£13	19	6"

Stephen, Serjeant, on a former day, on the part of the plaintiffs below, obtained a rule calling on the defendant below to shew cause why the transcript of the plaint and proceedings below returned to this court should not be remanded to the sheriff to be amended according to the facts of the case, if the pleadings therein referred to or any of them were delivered or set forth in the court below at length, or any of the proceedings therein referred to were more fully entered in the court below than appears upon the said return; or, if not, why the said sheriff should not certify to this court the practice of the county

court in that particular, and shew what forms of pleading are by the practice of that court understood to be expressed by the said entries; and why all proceedings upon the said writ should not in the meantime be stayed. He referred to *Williams* v. *Lord Bagot*, 4 D. & R. 315, where it was held that the court of King's Bench might order an inferior court to amend its record according to the facts of the case as they occurred below, after an imperfect record had been annexed to a writ of error brought in the former court upon the judgment.

John Jervis and *R. V. Richards* shewed cause.—According to the practice in the county court, as appears from the affidavits in answer to the rule, the parties appear personally, and on the defendant's appearance a declaration is filed, and the only entry in the under-sheriff's book is as here returned, which is perfectly intelligible to every person practising in the courts of Wales. [*Tindal*, C. J.—The sheriff is directed to record the proceedings: he should enter the declaration properly. What objection can there be, if the parties so well understand what is meant by the words "did grant to pay," to the declaration being set out on the record in its more expanded and usual manner?] The sheriff has returned to the writ all the materials that the records of his court furnish. If he has neglected his duty, that can be no ground for calling upon the defendant to do that which this rule requires. The rule should, at all events, have been served upon the sheriff.

Stephen, Serjeant, in support of his rule, was stopped by the court.

TINDAL, C. J.—If this had appeared in the shape of a record, we should not have interfered: but it is manifestly a mere minute of the proceedings and judgment in the court below. That which is now required is very analogous to the old course of proceeding upon a writ of error:

1837.

OVERTON v. SWETTENHAM.

when the whole of the record was not certified, the defendant in error must have given a rule for the plaintiff in error to allege diminution, or that the record was not duly certified or transcribed, and a writ issued to the justices requiring them to certify the whole record. The present being a proceeding by false judgment, in which there is no rule to allege diminution, what is this but an application that the judge of the county court may be required to return an intelligible record, in order to prevent a total failure of justice? I think the rule must be made absolute on payment of costs.

Stephen, Serjeant, submitted that it was not a case for costs, the plaintiff in error coming to uphold an unrighteous objection, and that costs were never allowed on a writ of false judgment—*Scott* v. *Bye*, 9 Moore, 649.

PER CURIAM.—The plaintiff in error is brought here by the rule. The defendants come to ask a favour, which they can only have upon the usual terms.

Rule absolute, on payment of costs.

Monday, May 8th.

The court will not deprive the plaintiff of the fruits of a judgment obtained by him on a special case argued and determined after the death of the defendant, though four terms have elapsed between the time of his obtaining and of his entering up judgment, unless it be shewn that the defendant's estate has suffered prejudice by the delay.

GREEN *v.* COBDEN.

THIS was an action of replevin tried at the Summer Assizes for Sussex in the year 1834, in which a verdict was found for the plaintiff, subject to the opinion of the court upon a special case. The special case came on to be argued in Hilary Term, 1836, when the court pronounced judgment for the plaintiff. In Easter Term following a rule nisi was obtained on the part of the avowant, to enter the verdict for the plaintiff on the first and fourth issues, and for the avowant on the second, third, fifth, and sixth issues; and to enter judgment for the avowant non obstante veredicto. This rule was in Trinity Term

discharged. The plaintiff (the avowant having died in the month of August, 1835, which was after the special case had been set down for argument, but before it was argued) then applied for leave to enter up judgment nunc pro tunc, as of the term in which it would have been entered up but for the delay necessarily consequent upon the special case. No rule for this purpose was granted, the court observing that the plaintiff was entitled to enter up the judgment without it. No attempt was made to enter up judgment until the last vacation; when the prothonotary declined to tax the plaintiff his costs, on the ground that they ought to have been taxed and final judgment entered up within two terms after judgment had been pronounced by the court.

W. H. Watson, on the part of the plaintiff, on a former day in this term, obtained a rule calling on the avowant to shew cause why the prothonotary should not be directed to tax the plaintiff his costs, and to sign final judgment for him.

Talbot now shewed cause.—This case does not fall within the statute 17 Car. 2, c. 8, s. 1, which limits the time for moving to enter up judgment to two terms after the verdict. [*Tindal*, C. J.—The delay was rather the act of the court, which is never allowed to prejudice the parties.] Undoubtedly, where a party is entitled to judgment, and the decision is delayed by the act of the court, the circumstance of the death of one is not permitted to enure to the prejudice of the other—*Bridges* v. *Smith*, 1 M. & Scott, 93, 8 Bing. 29, *Key* v. *Goodwin*, 1 M. & Scott, 620. But that rule only applies where the delay has arisen solely from the act of the court, and not where the party's own laches have conduced to it. In *Lawrence* v. *Hodgson*, 1 Younge & J. 368, it was expressly held, that, if the plaintiff die after verdict for him, and no judgment is entered up within two terms after the verdict, the court will not interfere and

1837.

GREEN v. COSDEN.

permit it to be entered nunc pro tunc, if any laches be imputable to the party interested in the judgment. Garrow, B., there says: "I perfectly understand the principle upon which the courts have permitted the parties to enter up judgment after the period in which they could legally have done so has elapsed, where the delay originates in the court, and but for which delay the judgment might have been regularly entered. Where a case stands over for argument from term to term, on account of the multiplicity of business in the court, or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, to meet the justice of the case. No such facts, however, exist in this particular instance, and the delay is imputable alone to the laches of the party interested in the judgment: the rule, therefore, which regulates the former cases, does not apply to this; and, as it is not within the operation of the statute, I am of opinion, on the authority of *Copley* v. *Day*, 4 Taunt. 702, that the rule should be discharged." Here, the parties have been guilty of still greater laches. The avowant died in August, 1835, and no step was taken to cause the judgment to be entered up until Hilary Vacation, 1837.

TINDAL, C. J.—I think this case falls within the general principle laid down or alluded to in the cases cited. It appears that a verdict was taken for the plaintiff; but, the question involved being one of difficulty, the facts were stated in the form of a special case. The hearing of the argument on the special case, from the press of business in the court, stood over for more than two terms: and the avowant died after the verdict, but before the special case, for the reasons before mentioned, could be argued, so as to entitle the plaintiff to judgment. If the plaintiff once had the right to have judgment entered up, I see nothing in the circumstances to authorize us to take it away from him: and I must confess I am not at all embarrassed by the

difficulty suggested in *Lawrence* v. *Hodgson*. The avowant's representatives do not shew that his estate is injured by the delay. Had that been so, there might be ground for the court to interfere.

1837.

GREEN v. CORDEN.

The rest of the court concurring—

Rule absolute.

(*a*) See Vaughan v. Wilson, Michaelmas Term, 1 Victoriæ, post, Vol. 5.

YOUNG *v.* COLE.

Saturday, April 29th.

ASSUMPSIT for work and labour as a broker, for money paid by the plaintiff to the defendant's use, for money had and received by the defendant to the use of the plaintiff, and for money found due upon an account stated between them. To the second and third counts of the declaration the defendant pleaded non assumpsit, and upon the first and fourth paid into court 25*s*.

The cause was tried before Tindal, C. J., at the Sittings in London after last Michaelmas Term. The action, it appeared, was brought to recover the proceeds of ten Guatemala Bonds of the nominal value of 250*l*. each, which had been, in the month of April, 1836, placed by the defendant in the hands of the plaintiff, a stock-broker, for sale, and sold by the latter for 300*l*., the proceeds, less 25*s*. for commission, being handed over to the defendant. It appeared from the evidence, that, some years ago, bonds were issued by the government of the independent province of Guatemala, in South America; that, about the year 1829, there being some doubt as to the regularity of the issue of these bonds, some excess of jurisdiction in the parties issuing them, the Guatemala govern-

The defendant placed in the hands of the plaintiff certain instruments called Guatemala Bonds. The plaintiff sold them to one B., who paid him the market price, which he handed over to the defendant. A few days after the sale, B. returned the bonds to the plaintiff, he having discovered that they would not be recognized by the government by whom they purported to have been issued, by reason of their not being stamped. The plaintiff thereupon refunded to B. the sum B. had paid

for them. It appeared that Guatemala Bonds on the Stock Exchange were understood to mean bonds duly stamped, and that unstamped bonds were utterly worthless. It further appeared that a stockbroker dealing in foreign stocks is treated with as a principal:—Held, that, under the circumstances, the plaintiff was entitled to recover against the defendant as for money paid to his use the amount repaid by the former to B.; and that it was competent to the plaintiff to rescind the contract without communicating with the defendant.

1837.

YOUNG v. COLE.

ment gave notice, by advertisement in several of the London newspapers, that none of the bonds so issued, save those that were within a certain period taken to their Chargé d'Affaires to be stamped, would be recognised by them. The bonds in question were not stamped. Being placed in the hands of the plaintiff for sale, as above mentioned, the plaintiff sold them to one Bryant, also a stockbroker, who a few days afterwards sold them to a third person. The last-mentioned individual finding, two days after he had purchased them, that the bonds were unstamped, returned them to Bryant, and Bryant returned them to the plaintiff, who, without any previous communication upon the subject with the defendant, returned him the money he had paid for the bonds, and brought this action to recover from the defendant the sum so paid. There was evidence to shew, that, by the practice or understanding of the Stock Exchange, Guatemala Bonds meant stamped bonds; and that, in dealing in foreign funds, brokers act as principals, and are liable to be expelled if they do not make good their differences. It was further proved that the defendant, on being applied to by the plaintiff to reimburse him the sum he had paid to Bryant, wrote to him in answer, stating that he held these particular bonds merely as agent, but that, if they were his own, he would desire his clerk to pay the amount. No proof was given at the trial that any of the bonds were the property of any other than the defendant.

On the part of the defendant it was contended, that no action was under the circumstances maintainable, the money, the produce of the sale of the bonds, having been paid by the plaintiff to the defendant with knowledge or the means of knowledge of all the circumstances; and that, at all events, if any action were maintainable at all, it must be a special action for a breach of the supposed warranty, and not an action for money paid; and the case of *Street* v. *Blay*, 2 B. & Ad. 456, was cited, where it was

held that a person who had purchased a horse warranted sound, sold it again, and then re-purchased it, could not, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor could he by reason of the unsoundness resist an action by such vendor for the price. A verdict having been taken for the plaintiff—damages 298*l.* 15*s.*— 1837. YOUNG v. COLE.

Sir *F. Pollock*, in pursuance of leave, in Hilary Term last, moved to enter a nonsuit.—He submitted that the plaintiff was bound to communicate with the defendant before he returned the money to Bryant, and thus give him an opportunity of causing the bonds to be stamped, which, for anything that appeared, might still be done; and that, although Young might, according to the rules of the Stock Exchange, as between himself and Bryant, be considered a principal in that transaction, yet, as between himself and the defendant, he was merely an agent, and should not have acted without instructions; he should have returned the bonds.

Wilde, Serjeant, and *Ogle*, now shewed cause.—The plaintiff being a member of the Stock Exchange, and subject to the rules of that society, one of which was, that, in transactions relating to foreign stocks, he could only deal as a principal, the defendant, when he entrusted him with the sale of the bonds in question, impliedly authorized him to do all that a principal was bound to do: as in the case of a del credere commission—*Grove* v. *Dubois*, 1 T. R. 112. It is true, that, in *Child* v. *Morley*, 8 T. R. 610, it was held that a broker who had contracted with others for the sale of stock at a future day, by the authority of his principal, who afterwards refused to make good the bargain, could not, on paying the difference to such third persons, maintain an action on an implied assumpsit against his principal for the amount. Here, however,

1837.

YOUNG v. COLE.

the plaintiff acted as principal, and was therefore bound to refund to Bryant the sum paid by him, on the bonds turning out to be unmarketable. In *Fisher* v. *Fallows*, 5 Esp. 171, it was held, that, where a person becomes bail for another, he is entitled to recover all the expenses he has been put to by reason of it, and may therefore recover expenses incurred in sending after the principal to take him, in order to render him. And the action is properly conceived: the consideration upon which the defendant received the money having totally failed, the plaintiff was entitled to recover it back on the count for money had and received. Thus, in *Wilson* v. *Milner*, 2 Camp. 452, where a levy was made on the goods of a trader after he had committed an act of bankruptcy, and the money levied was paid over to the party: an action of trover was afterwards brought by the assignees against the plaintiff in the execution, the sheriff, and the bailiff, in which damages were recovered, which, together with the costs, were paid by the bailiff: it was held, that, although there was no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover, yet that the bailiff might bring an action for money had and received to recover back the levy money paid over. The like principle was recognized in *Austin* v. *Ward*, 1 C. & P. 370, Ry. & M. 116, and *Lucas* v. *Worswick*, 1 M. & Rob. 293. The defendant's letter amounts to a ratification of the plaintiff's act in regard to the rescinding of the contract made by the latter with Bryant; for, he there admits his liability to refund provided the bonds were his own; and no evidence was offered by him at the trial to shew that he held them in the capacity of an agent for another—*Remon* v. *Hayward*, 2 Ad. & E. 666. With regard to the objection that the plaintiff omitted to return the bonds, it is to be observed that the case is not like that of an article which may be worth something; these bonds, not being

recognized in the market, were absolutely worthless. The case, therefore, falls within the principle of those relative to contracts for the sale of an article which turns out to be other than what the seller described it—*Gardiner* v. *Gray*, 4 Campb. 144, *Bridge* v. *Wain*, 1 Stark. 104. In *Jones* v. *Ryde*, 5 Taunt. 488, 1 Marsh. 157, it was held that a person who discounts a forged navy bill for another, who passed it to him without knowledge of the forgery, might recover back the amount as money had and received to his use, upon the failure of the consideration.

F. Robinson, in support of the rule.—Had Bryant been in a situation to compel the plaintiff to repay him the money, the plaintiff might perhaps have had a right to sue the defendant: but still, before he repaid Bryant, the plaintiff should at least have given the defendant an opportunity of settling on his own terms. The plaintiff, however, was not liable to refund to Bryant. He was conversant with the usages of the Stock Exchange, and saw the bonds before he purchased them. Unless the bonds were mere waste paper, he could not have recovered the money back from the plaintiff. There was nothing to shew that this was the case, for, though since 1829, none but stamped Guatemala Bonds had been sold in the market, the obligors were not exonerated on the unstamped bonds: they were clearly of *some* value: and, though the plaintiff may be entitled to recover of the defendant upon his implied warranty that the bonds in question were marketable, he cannot recover in this particular form of action. In *Jones* v. *Ryde*, the subject matter of the transfer was a forged navy bill, mere waste paper; and in *Bridge* v. *Wain*, and *Gardiner* v. *Gray*, the articles which were the subject of the sale were not what the seller represented them to be. *Street* v. *Blay* shews that the plaintiff's contract with Bryant was one that could not be

1837.

YOUNG v. COLE.

rescinded. Lord Tenterden there says; "Lord Eldon, in the case of *Curtis* v. *Hannay*, 3 Esp. 83, is reported to have said, that he 'took it to be clear law, that, if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse, and bring an action to recover the full money paid: but, in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value:' and he proceeds to say, that, if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This dictum has been adopted in Mr. Starkie's excellent work on the Law of Evidence, Part iv., p. 645: and it is there said that a vendee may in such a case rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that, where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article, and revest the property in the vendor, and recover the price as money paid on a consideration which has failed; but must sue upon the warranty, unless there has been a condition in the contract authorising the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a

fraud, which destroys the contract altogether." In *Gomperts* v. *Denton*, 1 C. & M. 207, it was held that the purchaser of a horse could recover for the breach of a warranty in an action for damages only, and could not sue for money had and received, as on a failure of the original consideration, unless there was a stipulation in the original agreement for rescinding the contract in such event, or unless the case were one of fraud. The same principle is recognised in 1 Wms. Saund. 269 *b*, note. Here, Briant having had an opportunity of inspection, there could be no implied warranty on the part of the plaintiff—*Parkinson* v. *Lee*, 2 East, 314, *Gardiner* v. *Gray*; and if there had been a warranty, the form of action is misconceived.

TINDAL, C. J.—It appears to me that the sum which the jury have by their verdict awarded to the plaintiff was properly money received by the defendant to the plaintiff's use. The money the plaintiff delivered to the defendant was his own money, he having sold the bonds as a principal to Bryant, and being subject to all the responsibilities of a principal. That money was delivered upon the faith and understanding that the bonds the plaintiff had received from the defendant were genuine and available Guatemala Bonds, and saleable on the Stock Exchange. It seems, therefore, that the consideration on which the money was paid has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. This is not a case of warranty; but the question is whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value. I am of opinion that he has. That disposes of the first question. The next is, whether or not the plaintiff had a right to rescind the contract he had entered into with Bryant. The defendant's name, it is to be observed was never used in the contract; there was no deal-

1837.

YOUNG v. COLE.

ing as between him and Bryant; the plaintiff alone was the person known to Bryant. But, independently of that, it appears to me that the universal course of dealing on the Stock Exchange would authorise the plaintiff to rescind the contract without consulting the defendant; and the defendant has not shewn that he has in any respect been damnified by what the plaintiff has done. There is, however, another ground upon which I hold the verdict unexceptionable, viz. that, after the defendant was aware of all that had been done, he wrote to the plaintiff, saying that, if the bonds were his own, he would send his clerk to pay him the amount. Having failed at the trial to shew that he held the bonds in the capacity of agent, as he had asserted, his letter amounts to a ratification of that which the plaintiff had done. Upon these grounds I think the verdict ought not to be disturbed.

PARK, J., concurred.

BOSANQUET, J.—I agree in the principle of the cases that have been cited as to breach of warranty. This, however, is not a case of that description. Here, no consideration whatever has been given for the money received by the defendant: the bonds he delivered to the plaintiff were not, as represented, Guatemala Bonds, but were held on the Stock Exchange to be utterly worthless. The payment made by the plaintiff to Bryant was not a voluntary payment. According to the principle established in *Child* v. *Morley*, the defendant was bound to reimburse the plaintiff what he was thus compelled to pay. It was proved to be the custom of the Stock Exchange, that, in the case of dealings in foreign stocks, the broker is treated as a principal, and is liable to be expelled if he does not make good his differences. Upon either of the counts, therefore, I think the plaintiff entitled to sustain this action. The defendant's letter, he having failed to

1837.

YOUNG v. COLE.

shew that the bonds were not his own, also entitled the plaintiff to retain the verdict.

COLTMAN, J.—I am of the same opinion. The first question is whether or not the plaintiff was entitled to rescind the contract with Bryant. I am of opinion that he was. The bonds he had sold at the defendant's request were not Guatemala Bonds, according to the understanding of the Stock Exchange. Therefore, even considering the plaintiff only as an agent, when he received authority from the defendant to sell the bonds, he received an implied authority to act as all brokers do upon similar occasions; that is, to rescind the contract if the article delivered turns out not to be the article sold.

Rule discharged.

WEBB *v.* RHODES.

Tuesday, May 2nd.

The plaintiff entered into an agreement with one J. S. for a lease of certain land in which J. S. had a life interest. By this agreement, which was drawn up by the plaintiff, and signed by the parties in his presence, it was stipulated that the lease and counterpart should be prepared by the plaintiff at the expense of the defendant. The draft of the lease and counterpart were accordingly prepared and settled, but before they could be executed, J. S. died:—Held, that there was sufficient evidence of a retainer of the plaintiff by the defendant to entitle the latter to maintain an action for the costs of preparing the lease and counterpart.

THIS was an action of assumpsit for an attorney's bill. The declaration contained the common counts for work and labour by the plaintiff as an attorney and solicitor for the defendant, upon his retainer, and for money paid by the plaintiff to the use of the defendant, at his request. The defendant pleaded non assumpsit.

The cause was tried before Park, J., at the sittings at Westminster after the last term. The facts were as follow:—One Mary Ann Wright, who had a life interest in certain land situate at Tottenham, on the 24th January, 1833, entered into the following agreement with the defendant:—

"The said Mary Ann Wright agrees to let, and the said James Rhodes agrees to take and rent of and from the said Mary Ann Wright, all those several pieces or

1837.

WEBB v. RHODES.

parcels of meadow and pasture land, situate &c. And the parties agree that a lease shall be granted, commencing at Michaelmas next, for the term of seven, fourteen, or twenty-one years, in case the said Mary Ann Wright shall so long live, at and under the yearly rent of 114*l.*; which lease shall contain the like covenants, conditions, and agreements, or such of them as shall be considered necessary, as the lease under which the said James Rhodes now holds the said lands; and it is also agreed that the said lease, and also a counterpart thereof, shall be prepared by Mr. Webb, solicitor, Reading, at the expense of the said James Rhodes.

(Signed) "Mary Ann Wright.
"James Rhodes."

The plaintiff, as Miss Wright's attorney, conducted the negotiation, drew the above agreement (which was signed by the parties in his presence), and afterwards, in accordance therewith, prepared the lease and counterpart. Pending the negotiation, the defendant had several communications by letter with the plaintiff on the subject of Miss Wright's title, and also with regard to the insertion of a particular covenant in the lease. Before the lease and counterpart could be ingrossed or executed, Miss Wright died. The plaintiff thereupon delivered his bill to the defendant, charging him with a moiety of the costs of the agreement, and the entire costs attending the preparing the abstract and the draft lease. The defendant, it appeared, had employed an attorney on his own behalf in the business.

On the part of the defendant it was contended that the action was not maintainable, there being no privity of contract between the plaintiff and himself, inasmuch as the plaintiff was not retained by the defendant, but by Miss Wright, to whom alone he could look for payment of his bill. It was further contended, that, if liable at all, the defendant could at all events be liable only to the extent of a moiety of the costs of the *agreement*.

A verdict was taken for the plaintiff, damages 14*l.* 2*s.* 9*d.* with leave to the defendant to move to enter a nonsuit instead, or to reduce the damages to the sum claimed as the costs of and attending the agreement only.

Crowder, in Hilary Term last, accordingly obtained a rule nisi.—He cited *Rigby* v. *Daykin*, 2 Y. & J. 83, *Pratt* v. *Vizard*, 5 B. & Adol. 808, and *Grissell* v. *Robinson*, 3 Scott, 329, 3 New Cases, 10.

Hoggins and *Nevile* now shewed cause.—All that the cases cited decide, is, that, where there is no privity between the attorney for the lessor and the lessee, though the custom be, that, in the absence of any express stipulation, the costs of the lease are to be paid by the lessee, still the latter is not liable to an action at the suit of the lessor's attorney. Whether that be the correct principle or not, is perfectly immaterial on the present occasion; for, the agreement of the 24th January, 1833, creates a sufficient privity between the plaintiff and defendant to entitle the former to maintain this action; it amounted in fact to a retainer. The correspondence between the parties on the subject of the covenants to be contained in the proposed lease, shewed clearly the understanding of the defendant on the subject. In the negotiation of a lease or mortgage, there is nothing unusual or improper in the same attorney acting for both parties (*a*).

Wilde, Serjeant, and *Crowder*, in support of the rule.—The plaintiff was no party to the agreement of the 24th January, 1833: it cannot therefore be held to create any such privity between the parties as is contended. The terms of that agreement import no greater a degree of liability than the usage of the profession would without it have

(*a*) See Doe d. Peter v. Watkins, Ante, 155, 3 New Cases, 421.

1837.

WEBB v. RHODES.

imposed upon the defendant. And there is nothing in the correspondence between the defendant and the plaintiff as Miss Wright's attorney, to evidence any assent on the defendant's part to the plaintiff's acting on his behalf: if any such inference could be drawn from that correspondence, it is negatived by the fact of the defendant having an attorney of his own whom he was consulting in the business. *Grissell* v. *Robinson* is precisely in point. If liable at all, the defendant can clearly be liable only to the extent of a moiety of the costs of the agreement; no lease having been either executed or in fact prepared.

TINDAL, C. J.—I see no reason for disturbing this verdict. The question is, whether, upon the evidence the jury had before them, they were warranted in finding that the plaintiff was retained by the defendant to do the work for which this action is brought. The first item in the bill is half the charge of drawing the agreement. At the time the agreement was entered into, Miss Wright and the defendant were strangers: the necessary inference from the conduct of the parties seems to me to be, that it was understood each party should pay half those costs. The last clause of the agreement provides "that the said lease, and also a counterpart thereof, shall be prepared by Mr. Webb, solicitor, Reading, at the expense of the said James Rhodes." The parties being all present when this agreement was executed, the plaintiff must be taken to have assented, just as much as if he had been actually a party to the contract. This, as it seems to me, sufficiently distinguishes the present case from those that have been cited: in neither of them was there any agreement on the part of the lessee to pay the lessor's attorney. Circuity of action, unless rendered unavoidable by the circumstances of the case, is to be deprecated. It is an inconvenience that there is no reason for extending. With respect to the objection that the lease and counterpart were never

executed—that was no fault of the plaintiff's. The defendant was aware that Miss Wright, the proposed lessor, had only a life interest in the premises. On the principle that actus Dei nemini facit injuriam, I think the plaintiff ought not to be deprived of his remedy against the defendant.

1837.

WEBB v. RHODES.

PARK, J.—I had no doubt at the trial, and have none now. I think the case should be considered the same as if the plaintiff had actually signed the contract. All the parties were present at the time of its execution. The plaintiff must under the circumstances, be considered as having assented to the retainer by the defendant.

BOSANQUET, J.—I am of the same opinion. The fair inference from the facts is, that, when the parties came together it was understood that each should pay half the expenses of the agreement. By that agreement it was stipulated that the lease and counterpart should be prepared by the plaintiff, at the expense of the defendant: and that agreement having been drawn by the plaintiff and executed in his presence, a sufficient privity was created between himself and the defendant to entitle him to sue. He clearly had no right to call on Miss Wright; and, as it was by no default of his that the lease was never executed, I think there is no defence to the action, and consequently that this rule must be discharged.

COLTMAN, J.—I am also of opinion that this case stands clear of the objection that the non-execution of the lease precludes the plaintiff's right of suing the defendant for his costs. There was clearly sufficient to warrant the jury in inferring a retainer.

Rule discharged.

1837.

Thursday, May 4th.

Lucas *v.* Godwin.

ASSUMPSIT for work and labour and materials, and for goods sold and delivered. The defendant pleaded non assumpsit.

At the trial before Coltman, J., at the last Huntingdon Assizes, the following facts appeared in evidence:—The plaintiff was a bricklayer, the defendant a farmer residing at Fawcett, and his son a carpenter in the same parish. On the 25th June, 1836, the plaintiff entered into the following agreement with the defendant's son:—

"Memorandum of an agreement made this 25th of June, 1836, between Mr. Gideon Lucas, builder, on the one part, and Mr. Thomas Godwin, of Fawcett, in the county of Huntingdon, on the other; that is to say, the said Gideon Lucas agrees to do all the bricklayer's, plasterer's, and slater's work, exclusive of slating laths, and brick floors, to six cottages about to be erected in Fawcett Fen, of the depth each cottage of twenty-feet four inches, and in breadth thirteen feet, outside measure, for the sum of 216*l.*, exclusive of stone foundations, the one half of which at the prime cost of the stone is to be paid for by the aforesaid Mr. Thomas Godwin: Mr. T. Godwin also hereby agrees on his part to pay unto the aforesaid Gideon Lucas the above sum of 216*l.*, on condition of the work being done in a proper and workman-like manner, on the 1st January, 1837, together with the amount of one

The plaintiff, in June, 1836, entered into a contract with the defendant's son (who was found to be his agent in the transaction) for building certain cottages, the defendant agreeing to pay the plaintiff "216*l.*, on condition of the work being done in a proper and workman-like manner, on the 1st January, 1837, and to be completed on the 10th day of October, 1836." The cottages were not completed by the 10th October; but the defendant afterwards took the benefit of the contract:—Held, that the plaintiff need not declare specially on the agreement, but might recover on the common counts for work and labor and materials.

In September, 1836, an advertisement appeared in a newspaper circulating in the neighbourhood in which the defendant resided, intimating that the defendant and his son had succeeded to an estate in America, on the death of a relative, and were on a given day and at a certain place to receive a large sum of money. The defendant gave currency to a report that his son had gone to Philadelphia to take possession of the estate; whereas in fact he was in confinement on a conviction for a misdemeanor. About the time the advertisement appeared, one Bannister read it to the defendant, who assumed to give credit to it. In the month of January following, the defendant admitted that the advertisement was a fabrication, and that the contract on which the action was founded, though made by his son, was made by his (the defendant's) authority and for his benefit:—Held, that a copy of the newspaper containing the advertisement was admissible in evidence to shew that the father and son were acting in fraudulent concert; and that it was not necessary to shew that the copy produced was the identical copy from which Bannister read the advertisement to the defendant.

1837.

LUCAS v. GODWIN.

half of the foundations as before mentioned, and to be completed on the 10th day of October, 1836."

The land on which the cottages were to be built belonged to the defendant; but there was no evidence that the son upon entering into the contract ever mentioned the defendant as his principal. The cottages were commenced, and both the defendant and his son from time to time gave orders to the plaintiff's men about them. There was some extra work, and the cottages were not completed till the 15th October. Towards the end of September, suspicions arose as to the solvency of the defendant and his son, especially of the latter; and, on the 23rd of that month, the son put an advertisement into the Stamford Mercury, purporting to emanate from one William Buck, administrator of Mr. Thomas Godwin, formerly of Fawcett, then of his Majesty's fleet, and latterly of Philadelphia, America. The advertisement was as follows:—

"Mr. Thomas Godwin's estate. The administrator of the estate and effects of Mr. Thomas Godwin, formerly of Crowlands, Lincolnshire, mariner on board his Majesty's fleet, and late of Philadelphia, America, who died on the 5th July, 1836, hereby gives notice that he is about to pay over the sum of 400*l.* to Samuel Godwin, late of Crowlands, in the county of Lincoln, yeoman, and his son Thomas Godwin, formerly apprentice at Rippingale in the said county, wheelwright, who are entitled to one hundred acres of land, together with the house, barn, and other buildings thereon, situate at Philadelphia, America. If the above claimants will meet at the White Hart, Spalding, on the 27th of September, between the hours of eleven and two o'clock, they will be entitled to the same, by inquiring of Mr. W. Buck, administrator to the deceased."

The defendant told the plaintiff's workmen that he was going to Spalding to receive the money mentioned in the advertisement, and afterwards, that he and his son had received 350*l.*, and that it was lodged in the Spalding

1837.

LUCAS v. GODWIN.

Bank; and he inquired of one of the workmen whether he had seen the advertisement. To a person named Bannister, who read the advertisement to the defendant, the latter recognised it as applying to himself. Shortly after the appearance of the advertisement, the defendant circulated a report that his son was gone to take possession of his American estate. In October, however, Thomas Godwin, the son, was apprehended on a criminal charge, and sentenced to imprisonment. The advertisement turned out, upon inquiry, to be a mere fabrication. In January, 1837, the defendant admitted to Wilkinson, the plaintiff's attorney, that the 400*l.* had never been received, and that his son had acted as his agent in the contract with Lucas. Before this admission was made, the plaintiff had sent in his bill to Thomas Godwin, the son.

On the part of the plaintiff, Bannister was called as a witness; he produced a copy of the Stamford Mercury, containing the advertisement in question: but, as it appeared that this was not the identical paper read by Bannister, its admission was objected to on the part of the defendant. The learned judge, however, received it as evidence of the fact, that, about the time of the conversation with Bannister, a newspaper had appeared containing an advertisement which corresponded with that read to the defendant.

In answer to questions put by the learned judge, the jury found that the son had made the contract as his father's agent, and with his authority; and that the plaintiff did not know of the agency till early in January, 1837. They also found that the plaintiff was induced by the defendant's fraudulent representations to give credit to the son; and that he had not, after he learned the true state of facts, elected to make the son his debtor.

A verdict was taken for the plaintiff, subject to a motion to enter a nonsuit, on the ground, that, the contract being conditional, the plaintiff should have declared specially on it, averring performance on his part by the 10th October.

1837.

LUCAS v. GODWIN.

Kelly, on a former day in this term, obtained a rule nisi to enter a nonsuit on the ground above stated.—He cited *Davis* v. *Nicholls*, 2 Chit. 320, and *Alexander* v. *Gardner*, 1 New Cases, 671, 1 Scott, 281, where goods having been purchased to be shipped in October, it was held that the shipping in October was a condition precedent, for the non-observance of which the defendants were at liberty to repudiate the contract.—He also moved for a new trial on the ground that the advertisement in the Stamford Mercury was improperly received, it having been published at a period long subsequent to the date of the contract, and not being the identical paper produced by the witness; and also on the ground that the defendant had been taken by surprise as to Wilkinson's testimony, which on a future occasion he would be prepared to contradict.

Byles and *Burch* now shewed cause.—The condition that the work should be done by the 10th October was sufficiently performed. The delay, for anything that appeared to the contrary, was occasioned by the extra work. In *Burn* v. *Miller*, 4 Taunt. 745, a lessor contracted to pay his tenant at a valuation for certain erections, pursuant to a plan to be agreed on, provided they were completed in two months; no plan was agreed on; and, after the condition broken, the lessor encouraged the lessee to proceed with the work: it was held that the lessee might recover as for work and labour, on an implied promise arising out of as many of the facts as were applicable to the new agreement. At all events, here, the contract having been executed, the plaintiff is entitled to declare generally. In 1 Wms. Saund. 269 n., it is said: "The general counts may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of the money." So, in Buller's Nisi Prius, 139: "Though an indebitatus assumpsit will not lie upon a special agreement till the terms of it are performed; yet, when that is

1837.

LUCAS v. GODWIN.

done, it raises a duty for which a general indebitatus assumpsit will lie:" more particularly where the party has acquiesced at the time, and where, as in the present case, the condition the breach of which is complained of does not affect the substance of the contract. The defendant, here, has possession of the cottages; and the case falls within the principle of *Hill* v. *Perrott*, 3 Taunt. 274, where it was held that indebitatus assumpsit would lie for goods which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had gotten into his own possession; for, he could not set up the sale, because his own fraud had procured it; and the mere possession, unaccounted for, raised an assumpsit to pay. In *Biddle* v. *Levy*, 1 Stark. 20, where goods were supplied to a minor upon a fraudulent representation by his father that he was about to relinquish his business in favour of his son, it was held that the father was responsible in assumpsit for goods sold and delivered. The contract having been entered into in June, and the defendant having admitted in the January following that his son had acted as his agent, statements by the former in the intermediate time were relevant to shew his connection with the contract.—With regard to the objection that the newspaper put in was not proved to be the identical paper read by Bannister to the defendant—it was produced merely to shew, that, at the time of the defendant's conversation with Bannister, an advertisement was circulated corresponding with the statements made by the defendant.

[The alleged surprise was not established by the affidavits to the satisfaction of the court.]

Kelly and *Gunning*, in support of the rule.—As a general rule, it may be admitted, that, after a contract is executed, it may be declared on generally. Where, however, the contract contains a condition which is an essential part of it, the plaintiff should declare specially, aver-

ring performance of the condition. Here, the condition that the cottages should be completed by the 10th October was an essential part of the contract; for, the payment of the stipulated price is expressly made to depend on that condition. If the contract had been set out, and the plaintiff had averred a dispensation with the condition, the defendant would have had the advantage of traversing that averment; and of this he is deprived by the general form of declaring. In *Alexander* v. *Gardner*, there was clearly a waiver of the condition; the parties, therefore, were in the same condition as if it had never been inserted. The newspaper was improperly admitted. The question was, whether the contract had been entered into by the son as the agent and by the authority of his father: and, if not, whether the plaintiff was induced to enter into it by the fraudulent misrepresentations of the father. The contract was entered into in June. What the defendant said in September following, with reference to the advertisement, could have no bearing on the question. Upon an indictment for a conspiracy, the subsequent conduct of the party is no more admissible than would be, upon a trial for felony, evidence of a distinct and different felony, which the prisoner is unprepared to meet. If the two Godwins had been indicted for a conspiracy to defraud the plaintiff, how would this newspaper have shewn that the plaintiff was induced to enter into a contract in June by an advertisement published in September? *Hill* v. *Perrott* and *Biddle* v. *Levy* only shew, that, where goods are obtained by fraud, the party who obtains them may be sued for goods sold and delivered; but not that he may be rendered liable for a contract entered into long before the fraud. At all events, the newspaper read by Bannister should have been identified. The defendant was not printer or publisher; and before the statute 38 Geo. 3, c. 78, it was not enough, even against the publisher, to shew, in an action for a libel, that the defendant published a newspaper

1837.

LUCAS v. GODWIN.

of the same name and on the same day; it was necessary to prove that he published the identical paper produced. What was here produced was admitted to be merely a copy of that which was shewn to the defendant. The original should have been produced.

TINDAL, C. J.—I see no reason for disturbing this verdict. Three objections have been taken to the plaintiff's right of recovery—first, as to the form of the declaration, that the contract was special; and that, instead of the general count for work and labour and materials, there should have been a count on the special contract, averring performance of the condition contained in it—secondly, that the advertisement in the Stamford Mercury was improperly received in evidence—thirdly, that the defendant was taken by surprise by the evidence of Wilkinson.

1. The contract is for certain work to be done in Fawcett Fen, and at the end of the contract the defendant agrees to pay 216*l.* on the 1st January, 1837, on condition of the work being completed in a proper and workmanlike manner on the 10th October, 1836. As the work was done and the payment to be made at a time which had expired before this action was commenced, I think the plaintiff was entitled to sue on the general counts. In all such cases a plaintiff is entitled to do so unless there be something express and explicit in the contract to shew a condition which goes to the whole root of the action. There is none such here. The condition that the work should be done in a proper and workmanlike manner, is implied in every contract of the kind; and if that were a condition precedent to the plaintiff's remuneration, any little deficiency would destroy the contract, and deprive a plaintiff of any claim for payment. But it has always been held, that, where the contract is executed, the jury are to say what the plaintiff really deserves to have. If it be said that the com-

pletion by the 10th October is the condition precedent, at least the objection should have been taken at the time: in accepting the work done, the defendant admits that it is of *some* benefit to him, and that the plaintiff is entitled to *some* remuneration. It is not a condition, but a stipulation, for the non-observance of which the defendant might be entitled to damages: but, if it were a condition, it is not one that goes to the essence of the contract, and is no answer to the plaintiff's claim for the work actually done. The parties never could have contemplated, that, if the houses were not completed by the day, the plaintiff should have no remuneration. At all events, if an engagement so unreasonable was contemplated, the parties should have expressed themselves with a precision that could not be mistaken.

2. It appears to me that there is no ground for the objection to the admissibility of the advertisement in the Stamford Mercury. It has been contended that it has no bearing on the question between the parties, the contract having been entered into on the 7th June, and the advertisement not having appeared until the September. The objection, however, cannot be supported on that ground. The question being whether the father and son had entered into a fraudulent compact, it was competent to the plaintiff to shew how they conducted themselves, not only at the time of the contract, but afterwards: the existence of a conspiracy shewn during the progress, or after the completion of the work, might throw a light on the conduct of the parties at an antecedent period: it is for the jury to judge of the whole, ex antecedentibus et consequentibus.

3. If the advertisement were relevant, was it admissible according to the strict rules of evidence? The objection urged is, that the newspaper produced was not shewn to be the identical one referred to in the conversation. The facts are these:—In September, the father says he is going to Spalding to receive money, and he prefaces his conversation with an inquiry whether his hearer had seen

1837.

LUCAS v. GODWIN.

an advertisement put into the Stamford Mercury by Buck, the administrator of Thomas Godwin, announcing that he had come to pay a large sum of money to the defendant and his son, and that they were entitled to an estate in Philadelphia. In that conversation certain specific facts are referred to; viz. that Buck was the administrator of Godwin; that he had come to pay money to the defendant and his son; and that they were entitled to an estate in Philadelphia. That which was offered in evidence was an advertisement containing a statement of all these facts. I cannot say, that, after the defendant had asked this question of his hearer, the laws of evidence exclude an advertisement containing all the facts he referred to. It is true there might be another advertisement with some variation: but, if that were so, it was incumbent on the defendant to shew it.

PARK, J., was absent.

BOSANQUET, J.—I am also of opinion that this rule should be discharged. With respect to the form of the declaration, I think it was sufficient for the plaintiff to declare on the common counts. It is contended that the contract was special and conditional, and therefore should have been declared on specially. It is, in fact, an executed contract, and the plaintiff has failed to comply with all its terms: the work, which was to have been completed on the 10th, was not completed until the 15th of October; but the completion by the 10th is not a condition precedent, going to the essence of the contract; and any inconvenience occasioned by the delay might have been compensated in an action for damages. The completion by the appointed day is said to be a condition precedent, because the payment stipulated in the contract is made to depend upon it. But, will it be contended, that, if only a small portion of the work had been left undone, the plaintiff would be entitled to nothing?

With respect to the admissibility of the evidence, the question was, whether the defendant was the principal in the transaction, and had authorised his son to enter into the contract as his agent. On the part of the defendant, it was contended that the plaintiff's having so long given credit to the son, was inconsistent with his afterwards charging the defendant as principal. In order to meet that argument, it was important for the plaintiff to shew the course of conduct pursued by the defendant during the whole time the plaintiff was giving credit to the son: and, in that view, all that passed between the time of making the contract and the month of January, when the agency of the son was first discovered, was material. Then, was the particular advertisement admissible, notwithstanding it was not identified as being contained in the very paper that was shewn to the defendant? I think it was. The defendant is shewn to have been speaking of *an* advertisement; not of an advertisement in any particular number of the paper; he adverts to certain circumstances as being the subject-matter of the advertisement: and a paper is produced which tallies so minutely with the facts communicated by the defendant to the witness, that it is impossible to doubt that the paper produced was that to which he referred.

COLTMAN, J.—I also think the verdict ought not to be disturbed. With respect to the form of the declaration, if the stipulation for the completion of the work by the 10th October be a condition, it does not go to the whole of the contract; and, though the plaintiff, if he failed to observe it, might be precluded from suing for the stipulated price, he would be entitled to recover something in an action for work and labour. But I think this is not such a condition as has been contended for. It is merely directory; and, after the contract has been executed, the general counts are sufficient. With respect to the evi-

1837.

LUCAS v. GODWIN.

dence, if the argument against the admissibility of the advertisement because it was of a date subsequent to the date of the contract, be well founded, in no case could subsequent fraud or conspiracy be set up to explain the conduct of a party on a former occasion. But, independently of that, it was the fraud perpetrated in September that induced the plaintiff to go on with the work which was not to be finished till October. It is then contended that the newspaper produced was not admissible, inasmuch as it was not identified as the copy from which the witness read the advertisement to the defendant. The defendant spoke of the advertisement generally. He was not speaking of any particular copy. That this was the advertisement thus generally referred to, there could not be any reasonable doubt: all the circumstances alluded to tallied exactly. On all the grounds, therefore, I concur in thinking that this rule should be discharged.

Rule discharged.

Friday, May 5th.

A writ of intrusion is maintainable by one in remainder, for an intrusion made after the determination of an estate pur autre vie.

One who claims under a devise may maintain a writ of intrusion—the case falling within the provision in the statute of Westminster 2, that, when a writ is granted in one case, and a thing happens in consimili casû, and needing a similar remedy, a writ should be made accordingly.

The time for suing out a writ of intrusion is limited, by the statute 32 Hen. 8, c. 2, s. 2, to fifty years.

PIERCY, Demandant; GARDNER, Tenant.

THIS was a writ of intrusion, by which the demandant demanded against Richard Gardner one-fourth part of one messuage, forty acres of land, and forty acres of meadow, with the appurtenances, in the parish of St. Giles, Reading, in the county of Berks, which he claimed to be his right and inheritance, and into which the said R. Gardner had not entry but by the intrusion which he made into the same after the death of Anna Maria Curtis, otherwise called Anna Maria Hyde who survived Ann Piercy, deceased, and Mary Powney the younger, deceased, of the entirety of which tenements, Richard Curtis, being seised in his demesne as of fee, gave and devised the same (amongst

1837.

PIERCY Dem., GARDNER Ten.

other tenements) to Jonathan Gardner and Richard Piercy, and their heirs, in trust to receive and take the rents and profits thereof, and thereout to pay unto the said Ann Piercy a certain annuity or yearly payment during her natural life, and to Mary Powney a certain other annuity or yearly payment during her natural life; and in trust to pay, as well the overplus rents and profits thereof, as also to pay the whole of the rents and profits of the said devised tenements, when and as the same several annuities should respectively end and determine, unto the said Anna Maria Curtis: and the said Richard Curtis did in and by the said devise direct, that, from and after the decease of the said Anna Maria Curtis, Jonathan Gardner and Richard Piercy, and their heirs, should stand seised of the said devised tenements, subject to the said annuities, to the use of one child or more of the children of the said Anna Maria Curtis, to be thereafter begotten, and the heirs of his or their body or bodies, either as to the whole, or in such parts, shares, and proportions, and for such estate and estates, either absolutely or conditionally, and with and under such restrictions, limitations, and remainders over, and in such manner and form, as the said Anna Maria Curtis by any deed or writing, deeds or writings whatsoever, to be by her, whether she should be covert or sole, from time to time sealed and delivered in the presence of two or more witnesses, or by her last will and testament in writing to be by her from time to time, whether she should be covert or sole, signed, sealed, published, and declared in the presence of three or more witnesses, should limit, direct, and appoint; remainder to such children as should survive, in tail; remainder to the use of such nephews and nieces of Richard Curtis, in fee, as Anna Maria Curtis should appoint; remainder, as to one fourth part, to the use of William Piercy, in fee: which ought after the death of Anna Maria Curtis to remain to the demandant as son and

1837.

PIERCY Dem., GARDNER Ten.

heir to William Piercy the younger, who was son and heir of the first named William Piercy.

The count alleged that Richard Curtis was seised by taking the esplees within fifty years, and died seised in January, 1787, without revoking or altering his will with respect to the said devises, or any part thereof; whereupon and whereby, and under and by virtue of the said last will and testament of Richard Curtis, the said Jonathan Gardner and Richard Piercy then and there became and were seised of and in the said tenements, with the appurtenances, upon the trusts and to and for the intents and purposes in the said will of Richard Curtis in that behalf expressed and declared of and concerning the same: that the said Anna Maria Curtis and Anne Piercy and the said Mary Powney, and also the first-named William Piercy survived the said Richard Curtis; and that Anna Maria Curtis survived Anne Piercy and Mary Powney and the first named William Piercy: that, afterwards, to wit, on the 1st January, 1806, the said Anna Maria Curtis died, never having had any issue, and never having made any limitation, direction, appointment, or gift, of the said tenements so devised, or any part thereof, according to the form and effect of the said devise: and thereupon, by virtue of the said devise, the right to the said one undivided fourth part above demanded of and in the said devised premises, with the appurtenances, came to and remained to William Piercy the younger, who was son and heir of the first named William Piercy: that, afterwards, to wit, on the 1st January, 1815, the said William Piercy the younger died; upon whose death the right to the said one undivided fourth part above demanded of and in the said devised tenements, with the appurtenances, descended and came to the said demandant, as son and heir of William Piercy the younger; and into which the said Richard Gardner had not entry but by the intrusion which he made

into the same after the death of the said Anna Maria Curtis, otherwise called Anna Maria Hyde.

1837.

PIERCY Dem., GARDNER Ten.

Upon demurrer to the plea, which was held ill for traversing a fact not alleged in the count—

R. V. Richards, for the tenant, excepted to the count.—The count is ill—first, because Anna Maria Curtis took only an equitable estate, and a writ of intrusion does not lie for an entry after the expiration of an equitable estate—secondly, because it does not lie for a devisee—thirdly, because it does not lie unless the demandant can shew a seisin within twenty years.

1. The writ of intrusion does not lie for entry after the determination of an equitable estate. Lord Coke says, 2 Inst. 277. a.: "Intrusion first properly is, when the ancestor died seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dieth, and betweene the death and the entry of the heire, an estranger doth interpose himselfe and intrude." In Fitzherbert's Natura Brevium, 203, it is laid down, that, "where tenant for life, or in dower, or by the courtesy, dieth seised of such estate for life, and after their death a stranger intrudeth upon the land, he in the reversion shall have this writ against the intruder;" and according to Booth, Real Actions, 381, the estate on which intrusion can be effected, must be a legal life estate. Here, Anna Maria Curtis had only an equitable estate: the legal estate was in her trustees, for they were not appointed to permit her to receive the rents, but to pay her themselves. They were to pay annuities, and to hold in trust for such persons as Anna Maria Curtis should appoint; to enable them to do which, it was necessary that the legal estate should be in them—Powell on Devises (by Jarman), 221 et seq., in notis.

2. The writ of intrusion lies only for a reversioner or remainder-man, and not for a devisee. In *Sir S. Romilly* v. *James*, 6 Taunt. 263, it was argued by Copley, Serjeant,

1837.

PIERCY Dem., GARDNER Ten.

"that writs are in the register drawn with great nicety; that the writ of intrusion will lie only in three cases, viz. upon the intrusion of a stranger, after the death of a tenant for life, tenant in dower, and tenant by courtesy; that the power given to the clerks in Chancery to frame new writs does not apply to enable them to frame writs so widely different as a writ must be which would be framed to meet a case like the present. A proof that there is much difficulty in framing a new writ, is, that the only instance of this statute having been acted on, is that of the writ in casu consimili, for remedy in the case of alienation in fee by tenant for life or by the courtesy, which is framed as closely as possible on the model of the writ in casu proviso, which extended only to alienation by tenant in dower. If any writ were to be framed for the present occasion, it would be on the model of a formedon, not of a writ of intrusion, for formedon in the reverter lay at common law on an estate conditional; and if formedon in the reverter is taken as the model, the devisee must take all the consequences of it: and one consequence is, to be barred by twenty years' adverse possession." But the court did not decide the point. In *Eastman* v. *Baker*, 1 Taunt. 174, which was cited by Lens, Serjeant, arguendo, in *Romilly* v. *James*, the point was never raised.

3. The demandant should have alleged a seisin within twenty years. The statute 32 Hen. 8, c. 2, s. 2, allows the demandant to recover on a seisin within fifty years:— "No manner of person nor persons shall hereafter sue, have, or maintain any assize of mort-ancestor, cosinage, ayel, writ of entry upon disseisin done to any of his ancestors or predecessors for any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was or hereafter shall be seised of the same manors, lands, tenements or other hereditaments, within

1837.

PIERCY Dem., GARDNER Ten.

fifty years next before teste of the original of the same writ hereafter to be brought." But the writ of intrusion is not mentioned in that statute; and the 21 Jac. 1, c. 16, restrains the 32 Hen. 8, c. 2, if that statute ever was intended to comprehend the writ of intrusion. [*Tindal*, C. J.—The only real action mentioned in the 21 Jac. 1, c. 16, is, formedon; the rest of the enactments seem to apply rather to ejectment.] The point was much discussed in *Romilly* v. *James*, and in *Widdowson* v. *Earl of Harrington*, 1 Jac. & W. 532, but left undecided in both those cases.

Stephen, Serjeant, for the demandant.—It may be contended that Anna Maria Curtis took only an equitable estate; but the trustees had the legal estate pur autre vie during her life; and then, according to *Jones* v. *Lord Say and Seale*, 8 Vin. Abr. 262, a legal estate was vested in William Piercy in fee. *Jones* v. *Lord Say and Seale* is a distinct and unanswerable authority. There, Mrs. Frances Ellis, by will dated 10th December, 1685, devised all her manors, messuages, lands, tenements, and hereditaments in A., B., and C., in the counties of Gloucester and Surry, to Thomas Earl, of &c., and Charles Morgan, of &c., their heirs and assigns for ever, upon trust and confidence nevertheless, but not upon condition, that they and the survivor of them, and the heirs of such survivor, should and would, in the first place, out of the rents, issues, and profits of the said manors, &c., *pay and satisfy the several legacies, devises, and bequests thereinafter mentioned*, viz. Imprimis, she gave and devised an annuity of —— to Jane Masters for life, and then devised other annuities for life to other persons, to be paid out of the rents and profits, and, after her trustees reimbursing themselves their costs and charges, she appointed her trustees to pay all the rest and residue of the rents, issues, and profits to the proper hands of her daughter Cecil Fiennes, or to such

1837.

PIERCY Dem., GARDNER Ten.

person or persons as she should by any writing or writings under her hand and seal direct and appoint for and during the term of her natural life, and, from and after her decease, the trustees to stand and be seised of the premises to the use of the heirs of the body of her said daughter Cecil Fiennes severally and successively as they should happen to be in priority of birth and seniority of age, and to the heirs of their respective bodies, in tail general, subject to the payment of the several annuities: and in case of failure of the issue of the body of her said daughter Cecil Fiennes, then to the use of Lady Catherine Jones, &c. Cecil Fiennes and her husband levied a fine and suffered a recovery of the premises, and died without issue; under whom the defendant Lord Say and Seale claimed the estate; and Lady Catherine Jones claimed under the will of Mrs. Frances Ellis by virtue of the remainder limited to her by the said will. Lord Chancellor King was of opinion, that, by the words of the will, the use was executed in the trustees and their heirs during the life of Cecil Fiennes, and she had only a trust in the surplus of the rents and profits, after payment of the annuities during her life, but, by the subsequent words, viz., that the trustees should stand seised to the use of the heirs of the body of Cecil Fiennes, &c., subject to the payment of the annuities, the use was executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities, and therefore, there being only a trust estate in the ancestor, and an use executed in the heirs of her body, those different interests could not unite so as to create an estate tail by operation of law in the ancestor; and his lordship accordingly decreed for the plaintiff, who was next in remainder under the will. That case is in no respect distinguishable from the present: the devise there was in almost the very words of the devise in the present case. The demandant claims in respect of an intrusion after the determination of the

1837.

PIERCY Dem., GARDNER Ten.

life estate, to the prejudice of the remainder-man. Intrusion is, where a stranger enters on the determination (by forfeiture or otherwise) of a preceding life estate. The fair inference from the passages cited from Lord Coke, Fitzherbert, and Booth, is, that a writ of intrusion lies where the preceding life estate was only an estate pur autre vie: for, the writ in such case, if not within the strict letter of those authorities, is in the nature of a writ in consimili casû. In Reeve's History of the Common Law, Vol. 2, p. 202, it is said, that the statute of Gloucester declares, "that, in cases where complainants were entitled to a writ in the Chancery, grounded upon the fact of another, the complainants should not depart from the king's court without remedy, because the land was transferred from one to another; as, because there was no writ in the register in the Chancery to be found adapted exactly to that special case, but the form of the writ was only to be had against the very person who actually raised the nuisance: so that should the house, wall, or the like, which occasioned the nuisance, be aliened to another, a writ was denied. That justice might no longer be delayed for want of legal remedies, it was now enacted, that, when a writ was granted in one case, and a thing happened in consimili casû, and needing a similar remedy, a writ should be made accordingly." Again, in Vol. 3, p. 89: "Not content with the writ of trespass in its old form, they endeavoured to make it more universal by enlarging its scope and modifying its terms so as to adapt it to every man's own case; in doing which they availed themselves of the statute of Westminster, 2, authorising writs to be framed in consimili casû." In *Eastman* v. *Baker*, where the circumstances were similar to those of the present case, the demandant recovered. It is true, the objection was not taken in that case; but, if not an authority in the demandant's favor, it is at least a precedent. Fitzherbert, who says the writ lies where tenant for life dies, does not say *how* tenant for life; and

1837.

PIERCY Dem., GARDNER Ten.

in *Smith* v. *Coffin*, 2 H. Blac. 444, it was held that a writ of abatement lay for the assignees of a bankrupt, though there is no mention of bankruptcy in Fitzherbert. What is said by Fitzherbert on this subject is not to be held to be the rule, but a mere example. *Widdowson* v. *The Earl of Harrington* decided nothing.

With regard to the necessity of alleging a seisin within twenty years, it is to be observed that the writ of intrusion is not mentioned in the statute 32 Hen. 8, c. 2, though perhaps it might be held to fall within the description of "other actions possessory." The 21 Jac. 1, c. 16, has not limited any of the old writs, except the writ of formedon, to twenty years.

R. V. Richards was heard in reply.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—The plea which was lastly pleaded having been held bad in the course of the argument, on the ground of its traversing a fact which is not alleged in the count, the tenant then proceeded to take objections against the sufficiency of the count itself: and the objections taken have been three in number—first, that Anna Maria Curtis, upon whose death the intrusion of the tenant is alleged to have taken place, appears upon the face of the count to be only an equitable tenant for life—secondly, that the demandant makes title by devise, and not by descent—and, lastly, that he has counted on a seisin of his ancestor within fifty years, whereas, as it is contended, a writ of intrusion is not maintainable, unless where the demandant can shew a seisin within twenty years next before the writ sued out.

First point.

As to the first objection, it is to be observed, that, as it is not raised upon a special demurrer to the count, pointing out any want of *form* in the statement of the demandant's title, it must be considered as if it were taken

1837.

PIERCY Dem., GARDNER Ten.

upon a general demurrer; in which case, by the statute 27 Eliz. c. 5, the judges are directed to give judgment "according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, declaration, or other pleading, except those only which the party demurring shall specially and particularly set down and express together with his demurer." The question, therefore, becomes this, whether the count shews upon the face of it a defective and insufficient title in the demandant to maintain the writ, or whether it shews a title which is good in substance, though set out informally and without sufficient certainty; for, whilst in the former view of the question the count must be held to be bad, in the latter the objection is not maintainable, not having been pointed out as cause of special demurrer. The objection relied upon, is, that Anna Maria Curtis, upon whose death the intrusion of the tenant is alleged to have taken place, appears to have no more than an equitable estate for life, that is, in the eye of a court of law, no estate at all, and consequently that no intrusion, in the legal sense of that word, can have taken place, intrusion being the wrongful act of a stranger in taking the possession after the death of the tenant for life, to the prejudice of the reversioner or remainder-man. But, looking at the statement of the title in the count, we find no allegation that Mrs. Curtis was the tenant for life upon whose death the intrusion took place; and, looking at the legal construction of the devise, and the circumstances stated in the count to have taken place, we think the necessary inference is, that Gardner and Piercy were seised of the legal estate in the premises during the life of the said Anna Maria Curtis, that is, that they were tenants for her life; for, as to the nature of their estate, we cannot entertain a doubt that they may be considered as tenants pur autre vie, notwithstanding they are directed by the will to pay the profits over to the cestui que vie; precisely in the same

1837.

PIERCY Dem., GARDNER Ten.

manner as if they had been allowed to take such profits to their own use.

The count, therefore, appears to us to be good in substance, provided the writ of intrusion be maintainable by him in remainder, for an intrusion made after the determination of an estate pur autre vie. And, as to that question, it must be admitted that no precedent of such a writ can be found in the books of entry; but, on the other hand, there is every reason, by analogy and strong authority, to shew that it may be maintained. The estate of tenant for term of life is defined by Littleton (s. 56) to be "for term of the life of the lessee or of another man." And it is obvious that the remedy by writ of intrusion would be very incomplete if it would not apply to an intrusion after the determination of each instance of an estate for life; for, if tenant for his own life assigns over to another, that other becomes directly tenant pur autre vie, and the remedy would fail. And the definition given of a writ of intrusion in Finch's Law, p. 195, a book of high authority, expressly comprehends the case in question. "Intrusion," says Finch, "is, after the death of tenant for life, be it a man's own life or another man's, in dower, or by courtesy," &c. With which agrees in effect, the book called Termes de la Ley: "Intrusion is a writ which lies against him who enters after the death of tenant in dower, or any other tenant for life, and holds out him in reversion or remainder." The objection, therefore, appears to us to amount to no more than that the allegation of the determination of the legal estate for life in the trustees, upon the determination of which the intrusion took place, is not alleged with sufficient form and preciseness, and consequently to amount to ground of special demurrer only, so that it cannot be insisted upon in the present state of the pleadings.

Second point.

The second objection is one which, if it is good in point of law, may undoubtedly be taken advantage of on general demurrer, viz. that a demandant who claims title under a

1837.

PIERCY Dem., GARDNER Ten.

devise cannot maintain a writ of intrusion. No express authority has been cited for this proposition; though, undoubtedly, on the other hand, no precedent can be found in the older books of entries of a writ so framed; one reason for which may be, that, until the statutes of devises, 32 and 34 Hen. 8, a remainder created by devise could never exist except in cities and boroughs where a custom to devise prevailed, and in those cases the customary writ of ex gravi querelâ would have been the proper remedy for an injury of the nature now complained of (see Fitz. N. B. 459). It is clear, however, that the writ of intrusion will lie where the demandant claims as a remainder-man; for, the authority of Fitz. N. B., 470, is express, "that, not only he in remainder shall have it, but the assignee of the remainder also." Now, this remainder must have been created either by a deed of gift or by devise; and an intrusion after the death of tenant for life is equally mischievous to him entitled to the remainder, whether it is created by the one mode or the other. Even admitting, therefore, that the writ in the register does not apply to the case, we cannot see any impropriety in holding the case to fall within the provision made by the statute of Westminster 2, c. 24, that, when a writ is granted in one case, and a thing happens in consimili casû, and needing a similar remedy, a writ should be made accordingly. And the case of *Eastman* v. *Baker*, 1 Taunt. 174, must be considered as a precedent, the writ being drawn precisely in the same form with the present; for, although the objection was never taken, yet it was apparent on the face of the count, and no one on the part of the tenant thought proper to take it.

Third point.

As to the objection on the statute of limitations, we are of opinion that the writ of intrusion falls within the statute of 32 Hen. 8, c. 2, and not within the statute 21 Jac. 1, c. 16. The second section of the former statute enumerates "writs of entry upon disseisins done to any of his ancestors or predecessors, or *any other action possessory*, upon

1837.

PIERCY Dem., GARDNER Ten.

the possession of any of his ancestors or predecessors," under which latter class of actions the writ of intrusion clearly falls. The statute of Jac. 1, on the other hand, does not apply to cases where the party is reduced to the necessity of bringing his real possessory action, but to cases where he has the right to make an actual entry without action brought, directing all such entries to be made within twenty years next after the right to enter has first accrued. And it is observable, that, as to writs of formedon, the limitation of fifty years, which had been fixed by the same statute of Hen. 8, is reduced to twenty years by an express enactment to that effect in the statute of 21 Jac. 1, the statute being altogether silent as to writs of intrusion or any other possessory actions.

Notwithstanding, therefore, the objections above taken against the count of the demandant, we think it good in law, and that judgment must be given in his favour upon the demurrer to the last plea.

Judgment for the demandant on the last plea.

Friday, May 5th.

MORISON and Another *v.* HARMER and Another.

Case for a libel on the plaintiffs in their business of vendors of medicine, wherein the defendants claimed "the merit of having crushed the self-styled hygeist system of wholesale poisoning, since they commenced exposing the homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pills;" and alleged that "several of the rot-gut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses;" and in another part asserting that the plaintiffs were in insolvent circumstances. The defendants pleaded, as to the portions of the libel above set forth, that the plaintiffs manufactured, compounded, and sold pills by them denominated "Morison's universal vegetable medicines," and styled themselves and other vendors of the said pills, hygeists; that the plaintiffs were wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe and administer medicines of any kind; that the pills were composed of substances which, when unskilfully compounded, were of a highly dangerous and poisonous nature; that the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements, descriptive of the pretended qualities of their medicines; that two individuals (naming them) died in consequence of taking large quantities of the pills as suggested and recommended in the said advertisements; and that the parties who severally administered the same were tried, convicted, and imprisoned for manslaughter. At the trial the defendants proved the death of the two individuals from taking the pills in question, though in smaller quantities than those recommended; and that the doses to the extent advertised would, in the opinion of several eminent practitioners, have accelerated their deaths:—Held, that the plea was sufficient after verdict, though it contained no justification of the expressions "scamps and rascals;" and that it was not necessary for the defendants to prove the allegation in the libel, that they had "crushed the self-styled system of wholesale poisoning."

THIS was an action for a libel on the plaintiffs in their trade and business as manufacturers and sellers of certain

good, wholesome, and lawful medicines, called Morison's Universal Vegetable Medicines, and for causing it to be believed that the said medicines were noxious, deleterious, and unwholesome, and that the plaintiffs were in bad and insolvent circumstances, and incapable of paying their just and true debts.

The defendants pleaded, as to so much of the said alleged libel as follows, that is to say, "We may safely claim the merit of having crushed the self-styled hygeist system of wholesale poisoning, since we commenced exposing the homicidal tricks of these impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pills, which pills were composed of nothing more or less than gamboge and aloes. Several of the rot-gut rascals have been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses;" that, long before and at the time of the composing and publishing the said alleged libel in the introductory part of this plea mentioned, the plaintiffs manufactured, compounded, and sold pills by them denominated "Morison's Universal Vegetable Medicines," at the said building and place by them called the British College of Health, and also during that time styled and denominated themselves and others who vended and administered the said pills, by the name and denomination of hygeists; that the plaintiffs, during all the time aforesaid, and whilst they so manufactured and sold the said pills as aforesaid, were persons wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe or administer medicines of any kind; that the said pills so manufactured and sold by the plaintiffs were composed of certain medicinal substances called gamboge and aloes, both of which said substances were well known to chemists and medical men, and were in common and ordinary use, and one of which, that is to say, gamboge, when unskilfully compounded, was of

1837.

MORISON v. HARMER.

a highly dangerous and poisonous nature; that the plaintiffs, in order to deceive and delude ignorant and credulous persons, without any sanction or authority whatsoever, appropriated to themselves and used the name and title of hygeists, as denoting themselves to be persons skilled in promoting and preserving health, whilst, in truth and in fact, they, the plaintiffs, were wholly unacquainted with medical knowledge of any kind, and utterly ignorant and unskilled upon the subject; and in like manner to deceive and delude, denominated and called the said building or place where they so manufactured and sold the said pills, "The British College of Health;" that, during all the time aforesaid, the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements and hand-bills, and therein falsely, audaciously, and wickedly stated, asserted, and pretended that the said pills so manufactured by them as aforesaid cured all diseases of every kind, and therein also audaciously and wickedly suggested and recommended that persons affected with diseases should take great and enormous doses and quantities thereof, and thereby, by such false and fraudulent tricks and devices, contrived and endeavoured to procure and effect the sale of the said pills, and to induce ignorant and credulous persons to purchase the same; that one of the said advertisements and hand-bills so published and dispersed by the plaintiffs, contained, amongst other things, the fraudulent, impudent, false, and delusive matters following of and concerning the said pills, and the said plaintiffs, and the said trade and business carried on by them as aforesaid, that is to say, "Health secured by Morison's pills, the vegetable universal medicine of the British College of Health, which has obtained the approbation and recommendation of some thousands in curing consumption, cholera-morbus, inflammations, bilious and all liver diseases, gout, rheumatism, lumbago, tic-doloreux, king's evil, and all cutaneous eruptions." Then followed

1837.

MORISON v. HARMER.

particular directions for their use, viz.:—"Nos. 1 and 2 are both aperient and purgative, and may be used indiscriminately; but experience has proved that No. 2 is the most efficacious in subduing many diseases: these diseases are, fevers of all kinds, inflammations, asthma, small-pox, measles, hooping-cough, gout, cholics: in fine, all violent diseases or pain; and, when the violence is over, Nos. 1 and 2 should be taken alternately till well, some days in small, and some days in large doses. It is keeping up the evacuations that effectually cures. Every bleeding is pernicious, and a step towards premature infirmities and the grave. You cannot go wrong with them by taking them at any time, day or night, or in any number, so innocent is their operation: but experience may point out the following rules, so as to render them more easy and serviceable:—as an aperient, and to prevent costiveness, the dose is from two to five pills at night or morning, or any time night or day. Should you feel any uneasiness after two or three days' use, it is a sign your stomach and bowels are foul; and some large brisk doses should be taken so as to get rid of the offending humour; and persevere in that way. As a brisk purgative, in either acute or chronic diseases, the dose is from eight or ten pills to twenty, or more, and, in urgent cases, should be repeated twice a day. Night or morning is the most convenient, when pursuing a course; otherwise, the best rule is, to take them when one feels sickness, fever, or ague coming on: they afterwards require no attention or alteration as to diet, drink, exercise, or cold; the only thing is, to continue them till well. During a course, if a patient feels any day not quite so well, let him reflect that he only wants more evacuations, and another dose will relieve him:" That, on the 24th June, 1834, one Richard Richardson, being then sick, was persuaded and induced by one Joseph Webb, he being one of the said self-styled persons called hygeists, to take, and did take, large quantities of the said pills as sug-

Averment as to the manslaughter of Richardson and Mackenzie.

1837.

MORISON v. HARMER.

gested and recommended in the said advertisements as aforesaid; and by reason and in consequence thereof, afterwards, to wit, on &c., died; and thereupon, afterwards, to wit, at the Assizes for the city of York, in the year 1834, before &c., the said Joseph Webb was in due form of law indicted and convicted of manslaughter for killing and slaying the said Richard Richardson, by so administering, and persuading, and inducing the said Richard Richardson to take the said pills; and such proceedings were thereupon had, that, at the said Assizes, it was adjudged and ordered by the said court that the said Joseph Webb should be imprisoned in the gaol of the said city for six calendar months; as by the record of the said conviction and judgment remaining in the office and custody of the clerk of the crown of the said city of York, at Gray's Inn, in the county of Middlesex, more fully and at large appears; and which judgment still remains in full force and effect, not reversed or otherwise vacated; and the said Joseph Webb was thereupon imprisoned, and confined in prison, in pursuance of the said judgment. [There was a similar averment as to the conviction of one Robert Salmon for the manslaughter of one Mackenzie under similar circumstances.]

The defendants also justified as to so much of the alleged libel as contained the charge of insolvency: on both of which pleas issue was taken.

At the trial before Tindal, C. J., at the sittings at Westminster after the last term, the publication of the libel by the defendants, in a newspaper called The Weekly Dispatch, having been proved, and the plaintiffs having called several persons who deposed to their having taken the pills in question in the doses recommended, and affirmed that they had derived benefit therefrom; the defendants called witnesses to prove that part of the libel which referred to the manslaughter of Richardson and Mackenzie, and the conviction and imprisonment of the plaintiffs'

agents, Webb and Salmon, consequent thereon. With respect to Mackenzie, it appeared that that individual had taken little more than half the quantities of the pills which Salmon had directed him to take; and several medical men who were called on the part of the plaintiffs stated that the plaintiffs' pills, taken with discretion, would not be injurious; one or two of them observing that Mackenzie had acted imprudently in not implicitly following the directions of Salmon as to the exhibition of the medicine. On the other hand, the medical men called on the part of the defendants stated that the taking of the larger doses prescribed would but have accelerated the death of the patient. The defendants also called two chemists of eminence, named Hume and Daniels, who stated that they had severally analysed the plaintiffs' pills, and found them to consist solely of gamboge and aloes. No evidence was offered in support of the allegation in the libel that the defendants had by exposing crushed the hygeist system. None of the articles published on the subject by the defendants in their paper prior to the appearance of the libel, were proved, though it was assumed on both sides that numerous publications reflecting upon the plaintiffs and their practice had from time to time appeared therein. It appeared that the sale of the plaintiffs' pills had decreased about one half since the trials of Webb and Salmon. The attempt to shew that the plaintiffs were insolvent altogether failed.

The jury found for the defendants upon the first issue, damages 200*l.*, adding, "We are of opinion that the pills, if administered with judgment and discretion, may be safely taken;" and they found for the plaintiffs on the second issue, as to the solvency of the plaintiffs.

F. Kelly, on a former day in this term, moved, on the part of the plaintiffs, for a rule calling upon the defendants to shew cause why a verdict should not be entered for the

1837.

MORRISON v. HARMER.

Semble, that there cannot be a new trial upon one of several issues.

plaintiffs on the first issue, or why a new trial should not be had upon that issue, or why judgment should not be entered thereon for the plaintiffs non obstante veredicto. [*Tindal*, C. J.—There cannot be a new trial upon one of several issues. I recollect having once searched without success for authorities on the point (*a*).] Unless there be an authority against it, it cannot be objectionable on principle; and such a course was adopted in *Bower* v. *Hill*, 1 Scott, 526, 2 Scott, 535, and in *The Cross Keys Bridge Company* v. *Rawlings*, 3 Scott, 400, 3 New Cases, 71; though in both those cases, it is true, the party moving was unsuccessful on *both* the issues. Two material allegations in the plea were either unsupported by evidence or wholly disproved. The plea professes to justify that part of the libel which states that the defendants had "crushed the self-styled hygeist system of wholesale poisoning:" and not a syllable of evidence was offered in support of that assertion. [*Bosanquet*, J.—There was evidence to shew that the plaintiffs' business had from some cause or other diminished one-half.] Then, the allegation as to the manslaughter of Mackenzie was entirely contradicted by the evidence; for, it appeared that the quantities of the pills taken by that individual were considerably smaller than those ordered; and it is at least extremely doubtful on the evidence whether his failing to follow implicitly the directions as to quantity did not accelerate his fate.

With respect to that part of the libel, in which the plaintiffs are designated as scamps and rascals—Those words might not be actionable if merely spoken; but, when printed and circulated in a public newspaper, and of a party in the way of his business, they clearly are so: and the plea is altogether silent as to any justification of that portion of the libel; there is nothing in any part of it to justify the use of those expressions. [*Tindal*, C. J.—The de-

(*a*) See Tidd's Practice, 9th edit. p. 911.

fendants in effect say, that, by "scamps and rascals," they mean persons who have acted in manner described in the plea.]

TINDAL, C. J.—I am of opinion that there is no ground for granting a new trial in this case. The objections to the verdict that has been found for the defendants on the first issue are two—first, that no evidence was offered at the trial in support of the allegation that the defendants had "crushed the self-styled hygeist system of wholesale poisoning" imputed to the plaintiffs in the libel—secondly, as to the alleged manslaughter of Mackenzie, that the averment that that person had been induced by Salmon to take large quantities of the plaintiffs' pills, was not only unsupported, but was directly at variance with the evidence given in the cause. I think, however, that there was enough to enable the jury to form an opinion on both points, and that there is no pretence for disturbing the verdict. If there was not any distinct evidence upon the subject, it was at least assumed on all hands that there had been former publications levelled at the system of the plaintiffs: the fact, indeed, formed the principal groundwork of the address of the plaintiffs' counsel to the jury. It seems to me to be too much to say that the defendants intended by the libel to convey that they had *entirely* destroyed the hygeist system: the fair construction is, that they had levelled attacks at it that were reasonably calculated to have that effect. Besides, that is not the main and substantial part of the libel; and it would be idle to send the cause down again on such a ground. With respect to the alleged manslaughter of Mackenzie, the statement in the plea is, that, one Mackenzie, being sick, was persuaded and induced by one Robert Salmon, he being one of the said self-styled persons called hygeists, to take, and did take, large quantities of the said pills as suggested and recommended in the said advertisements as afore-

1837.

MORISON v. HARMER.

said." Now, we must have recourse to the advertisements to see the mode in which the pills were recommended to be taken. One general advice to the consumer is, to be careful to take enough of them; and the advertisers seem anxious to impress upon the minds of their patients that the dose cannot be overdone. The evidence given upon this point, was, that Salmon prescribed larger quantities than were actually administered to the patient. Had the non-compliance with Salmon's directions been shewn to have occasioned the death of the party; for example, had a greater number of the pills been administered than were ordered; there would then have been a strong foundation for the argument that has been urged before us. The evidence, however, of the medical men who were examined to this point, went to shew that either quantity suggested could not fail to be mischievous in the highest degree, and that the patient's death must inevitably have been accelerated had he taken the larger doses. The whole evidence was before the jury: and I think they were fully warranted in finding that this allegation was substantiated. I am not therefore disposed to grant a new trial.

With regard to the motion for judgment non obstante verdicto, on the objection on the record, we will take time to look more carefully at the plea before we come to any decision on that point.

BOSANQUET, J.—I am also of opinion that there is no ground for granting a new trial in this case. It is said that the defendants failed to establish by evidence the allegation contained in the libel and professed to be justified by the plea, that they had crushed the self-styled hygeist system of wholesale poisoning. That expression, however, does not appear to me to import an absolute destruction and extinguishment of the plaintiffs' system or business: it merely meant that the defendants had made

strong attacks upon it (which was admitted to be the fact), and that they had made a considerable impression. It was for the jury to say whether the great decrease in the sale of the plaintiffs' pills was or was not to be attributed to these attacks. The next ground of objection is, that it was not shewn that Mackenzie had at the instigation and by the direction and advice of Salmon, the plaintiffs' agent, taken the pills in the manner pointed out by the advertisements. The substance of the advertisements is, that the patient should in all cases be careful to take enough of the pills. No precise quantities are prescribed in the advertisements. It appears that large quantities were taken by Mackenzie, and that at the recommendation of Salmon, though not in quantities so great as Salmon prescribed. But the evidence of the experienced medical men who were called on the part of the defendants, went to shew, that, had the patient taken the pills to the extent ordered by Salmon, a fatal result would in all human probability have ensued earlier. It is true that that was mere matter of opinion, and that there was contrary evidence given on the part of the plaintiffs. But it was for the jury to judge between the conflicting statements and opinions of the witnesses on the one side and the other.

COLTMAN, J.—I am also of opinion that it is impossible to say that there was not sufficient to be collected from the evidence to warrant the jury in finding that the allegations in the first plea were substantially proved.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court upon the point the consideration of which had been reserved.—We have considered the objection raised on the part of the plaintiffs against the form of the defendants' first plea of justification; and we are of opinion that there

1837.

MORISON v. HARMER.

is no ground for the motion which has been made for entering up judgment for the plaintiffs non obstante veredicto on that plea. The objection which has been taken is this, that the first plea, which professes to justify the truth of so much of the libel as is set out in its commencement, contains no answer to part, and that, as it is contended, a material part of the libel so set out; inasmuch as the libel as set out in the plea applies to the plaintiffs the opprobrious and scurrilous terms of "scamps and rascals," for the application of which terms the plea does not offer any excuse or justification. Now, it must be admitted, that, if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character from that which forms the main charge or gist of the libel, and the truth of which has been justified by the plea, the consequence above contended for on the part of the plaintiffs would justly follow; for, the plea, upon that supposition, would not contain an answer to so much of the declaration as by the commencement of the plea it expressly undertakes to justify. The main charge against the plaintiffs in the libel, is, that they were the compounders and sellers of pills of a poisonous and deleterious nature; and the main and principal allegation in the plea of justification, is, "that the pills sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended by them, were of a highly dangerous, deadly, and poisonous nature, and in the highest degree injurious to the stomachs and bowels of persons using and taking the same." The question, therefore, is, whether the terms of abuse which have been above referred to carry the matter any further than this, the main charge. The words themselves, in their vulgar use, convey no other meaning than that of general reproach and invective; and we can only discover whether they have any particular meaning in this libel, by referring to the context of the libel, and to

1837.

MORISON v. HARMER.

the allegations on the record. As to the word "scamp," the plaintiffs themselves have given the meaning to it; for, they allege, in their declaration, that it is intended to be applied to them "in the way of their aforesaid trade, business, and occupation," that is, as vendors of the pills the making and selling of which by the plaintiffs is the main imputation against them. And the word "rascals" is associated with an epithet or adjunct which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter. We cannot, therefore, understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient, unless it extends also to every epithet or term of general abuse which may be found in the description or statement of such imputation.

We think, therefore, the rule which has been applied for to permit the plaintiffs to enter up judgment non obstante veredicto, must be refused.

Rule refused.

FOSTER *v.* ALLENBY.

Friday, May 5th.

An insurance cause had been twice tried, by special juries, and a verdict on each occasion found for the plaintiff:—The court refused to open the consolidation rule, in order to the trial of another action on the same policy; it not appearing that the case had not been fully brought before the two former juries—Vaughan, J., diss.

WILDE, Serjeant, on a former day in this term, obtained a rule calling on the plaintiff in this action (on a sea policy) to shew cause why he should not proceed to the trial of this action, notwithstanding the consolidation of it with others brought by the same plaintiff on the same policy.

Taddy, Serjeant, now shewed cause.—This is an application which the court cannot entertain. The cause has

1837.

FOSTER v. ALLENBY.

already been tried twice, by special juries, and the verdict returned on each occasion was the same. In the absence of any suggestion that the cause now before the court differs in any material degree from that which has already been tried, or that new evidence will be produced (*a*), the present rule cannot be made absolute. The case might have been different if there could have been any doubt as to the merits having been fully before the juries who tried the former cause: but that is not suggested. In *Cohen* v. *Bulkeley*, 5 Taunt. 165, this court, thinking it reasonable to open a consolidation rule and try a second cause, extended to the second trial all such terms made compulsory on the party successful in the first cause, as were requisite for attaining the merits. And in *Doyle* v. *Douglas*, 4 B. & Ad. 544, where actions against underwriters had been consolidated by rule of court, and the defendant had obtained a verdict in one, the court of King's Bench refused to restrain the plaintiff from trying a second cause, included in the rule, till the costs of the first were paid. These cases shew the extent to which the courts will go.

Wilde, Serjeant, in support of his rule.—This is an application to the equitable discretion of the court. The first cause, it is true, was tried twice, and on both occasions the verdict was the same way; but, on an application for a third trial, the court were divided in opinion as to whether the rule should be granted. It would be manifestly unjust to hold the present defendant to be bound by a verdict which cannot be said to have received the approbation of the court. The agreement entered into by the defendant by the consolidation rule, is, that he will be bound by a decision which should meet the approbation of

(*a*) But see Pullen v. Parry, 1 Chit. R. 709 (*a*), where it was held, that, where a consolidation rule has been entered into, though fresh evidence is discovered, the court will not permit the plaintiff to try the other actions.

the judges of the court in which the action is brought. Here, no such approbation has been expressed; for, the ground upon which the new trial in the other cause was refused, was, not that the court were satisfied that the merits had been fairly dealt with, but the intervention of a technical rule of law, which some of the judges thought applied to the case. [*Park*, J.—Can you point out an instance where, after a second verdict the same way, the consolidation rule has been opened?] No case has been found precisely in point; but the judges have said that they would grant trial after trial where the verdicts were not satisfactory (*b*); and it would be extremely mischievous to establish a contrary rule in cases like the present.

TINDAL, C. J.—I am of opinion, that, if we were to grant this application, it would be making a very dangerous precedent; for, if the verdict in this case went the same way, we should have similar applications from all the other defendants, and the benefit of the rule would be lost. I do not say that in no case can a consolidation rule be opened: but, here, after two verdicts returned by special juries, both the same way, I think it would be improper to send the case back again upon a mere question of fact. Whatever may have been my own opinion with regard to the merits of the case, I think a private right must give way to public justice and convenience.

(*b*) There is no limit to the discretionary jurisdiction of the court in granting as many new trials as may seem to be proper, where the jury either mistake, or neglect, or abuse their duty, by finding from prejudice, &c.—Lopez v. De Tastet, 8 Taunt. 712, 7 Moore, 120. And see Levy v. Milne, 11 Moore, 418, 4 Bing. 195.

But, in Swinnerton v. The Marquis of Stafford, 3 Taunt. 232, where the circumstances of the case had been fully put into the possession of the jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the judge who last tried the cause thought the evidence against the verdict preponderated, this court refused to grant a third trial on the same ground.

1837.

FOSTER v. ALLENBY.

PARK, J.—I am of the same opinion. I do not recollect any case in which, after two verdicts the same way, a consolidation rule has been opened. There is no suggestion here that the merits of the case were not fully before the juries on both trials.

VAUGHAN, J.—I regret that I cannot reconcile myself to the opinion that this consolidation rule should not be opened. I cannot but consider this to be an application to the sound discretion of the court. It has been asked, whether there is any case in which, after two verdicts the same way, the court have opened a consolidation rule. Probably not. But I would also ask whether there is any case in which, after two such verdicts, the court have been divided in opinion as to the propriety of granting a third trial. It is, no doubt, important that there should be an end of disputes. The parties in the original action have had two trials, and the plaintiff has had the benefit of the verdicts; but a third party now comes forward, and says, "Although I have been bound by my consent to the consolidation rule, yet I consented only to be bound by a verdict which should meet the approbation of the court." The verdicts returned have not met the approbation of the court; and therefore I think he is entitled to a trial of his cause. The plaintiff cannot be deprived of his judgment in the cause which has been tried, by the opening of the rule. Under all the circumstances, I am not satisfied that the underwriter should be concluded by the verdicts that have already been given.

COLTMAN, J.—I am of opinion that no sufficient ground has been laid for opening the consolidation rule; and that the rule that has been obtained for that purpose should be discharged.

Rule discharged.

1837.

Monday, May 8th.

Ex parte BRANSON.

Charges for taking acknowledgments of deeds, and for examining married women, and for proceedings under the act for the abolition of fines and recoveries, 3 & 4 Will. 4, c. 74, for completing and giving effect to such acknowledgments and examinations, do not constitute taxable items within the 2 Geo. 2, c. 23, s. 23.

HOGGINS, on a former day, obtained a rule calling on Mr. Branson, *an attorney of the court of King's Bench*, to shew cause why a bill delivered by him for business done by him under the 3 & 4 Will. 4, c. 74, the fines and recoveries abolition act, should not be referred to the prothonotary for taxation. The items which it was contended brought the bill within the jurisdiction and cognizance of the court were, charges for

"Attending to appoint two of the commissioners under the act to take the acknowledgement,

"Filling up certificate, and drawing and engrossing assignment in lieu of acknowledgment of fine,

"Attending Mrs. Stephenson (the married woman) before the commissioners, examining her apart from her husband,

"Attending before the commissioners when the affidavit was taken, and fees paid to the commissioners,

"Attending to get the affidavit of acknowledgment sworn,

"Paid for oath and exhibit,

"Attending to leave certificate for inrolment, and paid fees thereon,

"Attending to bespeak, and for office copy of inrolment, and paid for same."

Wilde, Serjeant, now shewed cause.—There is no foundation for the motion. Under the old practice, when the proceeding was by fine, there was a supposed cause in court, and therefore the bill was held to be taxable—*Ex parte Prickett*, 1 N. R. 266. But now, the legislature have substituted an entirely different mode of proceeding, and there is no cause pending in court. All the proceedings of this court must be conducted by its own officers;

1837.

Ex parte Branson.

but, in order to enable a party to transact business like that now in question, it is not essential that the party conducting it should be an attorney of this court: nor is it even necessary that he should be an attorney at all. [*Tindal*, C. J.—I might have appointed as commissioners under the act persons who were not attornies at all, though I have not thought proper to do so.]

Hoggins, in support of his rule.—By the 89th section of the 3 & 4 Will. 4, c. 74, it is enacted "that the Lord Chief Justice of the court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom the certificates shall for the time being be lodged, and may remove him at pleasure; and the court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit, touching the mode of examination to be pursued by the commissioners to be appointed under the act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court as hereinbefore directed, and also of *the fees or charges to be paid for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.*" [*Park*, J.—That clause applies to the fees payable to the commissioners and others, which are provided for by the rules of Hilary Term, 4 Will. 4.] The inrolment of the certificate of the taking of an acknowledgment, and of the affidavit verifying the same,

1837.

Ex parte Branson.

under s. 85, are acts done in court. [*Tindal*, C. J.—A charge for inrolling a deed in this court would not make the bill taxable.] The words of the 2 Geo. 2, c. 23, s. 23, are, "fees, charges, or disbursements, at law, or in equity;" and it has been the anxious desire of the courts of late years to extend as much as possible the provisions of so useful and beneficial an act. In *Winter* v. *Payne*, 6 T. R. 645, drawing an affidavit of debt and getting it sworn, was held to constitute a taxable item. So, in *Fearne* v. *Wilson*, 6 B. & C. 86, 9 D. & R. 157, a charge in an attorney's bill for attending at a lock-up house and obtaining the defendant's release, and filling up the bail-bond, was held to be a taxable charge. [*Park*, J.—Suppose the acknowledgement were taken, as it might have been, before a Master in Chancery—would that have given the court of Chancery authority to tax the bill?] In *Smith* v. *Wattleworth*, 6 D. & R. 510, 4 B. & C. 864, 1 C. & P. 615. fees for procuring the discharge of an insolvent debtor were held taxable. So, fees for holding courts leet as steward of a manor—*Lethbridge* v. *Luxmore*, 1 D. & R. 511, 5 B. & A. 898. All these cases shew that the courts will if possible draw the items of charge within the statute.

Tindal, C. J.—By the 3 Jac. 1, c. 7, s. 1, the first act relating to attornies, it was provided that "all attornies and solicitors shall give a true bill to their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with their hands and names, before such time as they, or any of them, shall charge their clients with any the same fees or charges." A subsequent statute having reference to the same subject-matter, the 2 Geo. 2, c. 23, s. 23 (made perpetual by the 30 Geo. 2, c. 19, s. 75), further enacted, that no attorney of his majesty's courts of King's Bench, Common Pleas, or Exchequer, &c., shall commence or maintain any action

1837.

Ex parte Branson.

or suit for the recovery of any *fees, charges, or disbursements, at law or in equity*, until &c.; and, upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto *any of the courts* aforesaid, or unto a judge or baron of any of the said courts respectively *in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted*, it shall be lawful for any of the courts aforesaid, or for any judge or baron of any of the said courts respectively, and they are thereby required, to refer the bill, and the attorney's demand thereupon, to be taxed and settled by the proper officer of such court, &c. These statutes clearly appear to me to relate to fees, charges, and disbursements in the course of a suit: and I must say it appears to me that the court went very far in holding, as they did in *Ex parte Prickett*, 1 N. R. 266, that a charge in an attorney's bill for suing out a dedimus potestatem was sufficient to enable the court to refer for taxation a bill, with this exception, consisting entirely of charges for conveyancing. Then comes the 3 & 4 Will. 4, c. 74, the very title of which seems to me to preclude any argument—"An act for the abolition of fines and recoveries, and for the substitution of more simple *modes of assurance*." Though the deed is required to be recorded in this court, it is not a proceeding in a suit; it is nothing more than a mode of conveyance. I therefore think this rule must be discharged. The defendant is not left without remedy: he has a right, if so advised, to take the sense of a jury upon the reasonableness of the charges.

Park, J.—No doubt the statute 2 Geo. 2, c. 23, is highly beneficial to the suitors. But I think the courts have gone to the very verge of the authority conferred upon them by that act in directing bills to be taxed. The bill in this case seems to me not to fall within the meaning of the statute: there is no proceeding in court. All deeds and

documents relative to acknowledgments taken under the act, are, it is true, required to be inrolled in this court; but that is for the purpose of safe and convenient custody only.

1837.

Ex parte Branson.

Bosanquet, J.—I am of the same opinion. The charges in question are not incurred in any proceedings at law either actually commenced or in contemplation.

Coltman, J., concurred.

Rule discharged, without costs.

The Archbishop of Canterbury *v.* Daniel Tubb.

Monday, May 8th.

In an action by creditors of an intestate, in the name of the Archbishop, upon an administration bond, against a surety, it appearing that the action was brought without the knowledge or assent of the nominal plaintiff, and without indemnifying him against costs, and the judge of the Prerogative Court declining to permit the bond to be taken out of the registry for the purpose of giving the defendant oyer in the usual way (profert having been made by the declaration):—This court refused to make a rule that production of the bond to the defendant's attorney, at the plaintiffs' expense, at the office in Doctors' Commons, or the delivery to the defendant's attorney of *an attested copy* of the bond, should be deemed sufficient oyer.

THIS was an action instituted by Edward Crowley and Robert Smith Sharman, creditors of one Charles Tubb, deceased, who died intestate, against the defendant, one of the sureties in an administration bond, in the penal sum of 2,000*l.*, given in the usual form to the Lord Archbishop of Canterbury; no account or inventory having been filed in the registry of the Prerogative Court of Canterbury pursuant to the condition. The declaration, containing a profert of the bond, was delivered on the 12th March, 1835. On the 27th, the defendant's attornies demanded oyer and a copy of the bond; whereupon the attorney acting for the plaintiff applied to the record keeper of the Prerogative Court, who had the custody of the bond, and requested that a clerk might be allowed to attend at the office of the defendant's attornies with the original bond, on payment of the usual fee, explaining to that officer the nature and object of the application, and the purpose for

1837.

Archbishop of CANTERBURY v. TUBB.

which the bond was required; but the application was refused, the record keeper alleging that he was not authorized to allow the bond to be taken out of the registry, unless he was served with a subpœna to attend upon a trial or on the hearing of a cause. Being thus frustrated in his attempt to give profert in the ordinary way, the plaintiffs' attorney, on the 30th March, delivered to the defendant's attornies an attested copy of the bond, which they received without objection, and paid for. On the 13th April, however, a summons was taken out on the part of the defendant, calling upon the plaintiff to shew cause why the proceedings should not be stayed until the production of the original bond upon which the action was brought, and why the defendant's attornies should not be furnished with a copy thereof. The summons was attended on the following day before Gaselee, J., to whom it was stated that the original bond was in the registry of the Prerogative Court, and could not be produced; but that an attested copy had been furnished to the defendant's attornies, for which they had paid without objection; and that the plaintiff's attorney was ready at any time to attend the defendant's attornies to the registry of the Prerogative Court, and there at the expense of the plaintiff cause the bond to be produced. The learned judge, however, made an order for a stay of the proceedings until the production of the original bond, and for the delivery of a copy to the defendant's attornies. Application was thereupon made, on behalf of Crowley and Sharman, to the judge of the Prerogative Court of Canterbury, for leave for one of the officers of the registry of that court to attend with and produce the original bond at the office of the defendant's attornies, in order that they might compare the copy so furnished to them with the original. On the 24th November, the application was finally rejected. All bonds taken under the statute 22 & 23 Car. 2, c. 10, remain in the custody of the record keeper in the register's office,

and may be inspected by all persons on payment of a fee of one shilling.

Wilde, Serjeant, upon an affidavit of the above facts, on a former day in this term, applied for a rule calling on the defendant to shew cause why the order of Mr. Justice Gaselee should not be discharged; and why the defendant should not be deemed to have had sufficient oyer of the bond; or why the production of the said bond to the defendant's attornies or agents at the register's office in Doctors' Commons, where the same remained, at such time as this court should direct, should not be deemed sufficient oyer of the said bond; the plaintiffs undertaking to pay the defendant or his attornies his costs of attending to inspect the same.—The bond is given to the Archbishop as a public officer. In *The Archbishop of Canterbury* v. *House*, Cowp. 140, Lofft, 622 (recognized in *The Archbishop of Canterbury* v. *Robertson*, 3 Tyr. 390, 1 C. & M. 691), it was expressly decided that a creditor has a right, ex debito justitiæ, as well as the next of kin, to sue upon an administration bond in the name of the Archbishop or his ordinary. Such being the creditor's right, all that is essential to enable him to prosecute that right with effect must follow of course. In ordinary cases, the bond is supposed to be in court, and, in order to have oyer, the defendant must come to the court, that is, to the office of the court—the prothonotaries' office. The prothonotaries' office might be in Doctors' Commons, or any where else: there is, therefore, no reason why the register's office should not for this purpose be deemed to be the office of the court, that justice may not be defeated. [*Tindal*, C. J.—Was it necessary to make profert at all? The bond is in the custody of the law. Where an action is brought in one court upon a document on the files of another, the course is to excuse profert.] The circumstances attending the custody of this bond are scarcely

1837.

Archbishop of CANTERBURY v. TUBB.

such as to warrant an excuse of profert, considering who is the nominal plaintiff.

A rule nisi having been granted—

R. V. Richards and *Arnold* now shewed cause.—The grant of oyer is matter of right; to refuse it would be error in the record: and oyer can only be had by bringing the document into court, where it is supposed to remain for one whole term. The general rule appears from Co. Litt. 35. b., and 10 Rep. 92. a., to be, that a person who pleads a deed from which he claims benefit shall bring it into court; and the reasons given are, that the court may see that the words be sufficient in law; that the deed be not razed or interlined in material places; and whether it be made on any condition, or with power of revocation. The only two allowed exceptions are, either where the deed has been pleaded in some other court, where it remains and may be resorted to; or where it is in the possession of the adverse party—*Wymark's* case, 5 Rep. 74. b., 75. a. In Stephen on Pleading, speaking of oyer of the writ, it is said, p. 73, that the demand in the days of oral pleading was complied with by reading the writ aloud in open court; and, after the establishment of written pleadings, by exhibiting, and, if required, delivering a copy of the instrument to the party who makes the demand. And in p. 93, speaking of oyer of deeds of which profert has been made, it is said: "By the present practice, the attorney for the party by whom it is demanded, before he answers the pleading in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer, on which the latter is *bound to carry him the deed*, and deliver him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court." So, in *Page* v. *Divine*, 2 T. R. 40, Ashhurst, J., says: "The party of whom oyer is demanded must

1837.

Archbishop of CANTERBURY v. TUBB.

carry it [the deed] to the opposite party." A difficulty was formerly felt in the case of a lost deed: but, in *Read* v. *Brookman*, 3 T. R. 151, it was determined that a deed might be pleaded as *lost by time and accident*, without profert. Grose, J., in that case, differed from the rest of the court—observing that, "from the time of the Year Books, cited in Brooke, to that of Lord Hardwicke, there is an uniform current of authorities, that, where a party pleads a deed, he must produce it." It is an invariable rule, that, where the deed has been destroyed or lost, or is in the hands of the defendant, it must be so averred in the declaration. Thus, in *Thoresby* v. *Sparrow*, 1 Wils. 16 (*Soresby* v. *Sparrow*, 2 Str. 1186), in covenant upon a lease, the defendant prayed oyer; the plaintiff made affidavit that he had searched for the lease and could nowhere find it, and he prayed the court to dispense with the oyer, for that he had not the original lease, but only a copy. But, per Curiam—"This business of oyer does not depend upon the rules of the court, but the defendant has a right to it by law, and it would be error if the court should deny the defendant oyer, as the defendant has declared upon the deed, and made a profert thereof; for, now it is supposed to be actually in court, how then can we deny it? If anything can be done for plaintiff in this case, it must be by helping plaintiff in declaring, and there, upon proof that the original lease is lost, a copy may be given in evidence, and plaintiff might have declared in debt without setting forth this deed; but, wherever an action is brought on a deed, charging defendant with the execution of it, the plaintiff must there bring the deed into court: the reason is, that the court may see whether it be executed according to law; and we had better suffer a private mischief than a public inconvenience." In *Totty* v. *Nesbitt*, 3 T. R. 153, n., on a motion for a rule to shew cause why the defendant should not waive his demand of oyer, and plead, to an action on a bond; the

1837.

Archbishop of CANTERBURY v. TUBB.

plaintiff having before filed a bill in the Exchequer for a discovery, and the defendant in his answer having admitted that he had executed such a bond, and that he had destroyed it—Buller, J., said: "You have declared with a profert; and after that the court cannot say that the defendant shall not have oyer. You should have declared that the bond was destroyed, and then it would have appeared on the record that the defendant was not entitled to oyer. All we can do for you is, to order that the production of a copy shall be oyer." In *Matison* v. *Atkinson*, 3 T. R. 153, n., a rule had been obtained to shew cause why giving oyer of a copy of the bond should not be deemed good compliance with the defendant's demand of oyer of the bond. The facts which induced the rule were these:—Several actions having been depending between the parties, they were referred to an arbitrator, who awarded that the bond in question should be delivered up to the defendant to be cancelled. The bond was accordingly delivered up and cancelled, the plaintiff's attorney keeping only a copy: and the award was afterwards set aside for partiality. On cause being shewn, it was observed that the plaintiff had mistaken his remedy, and that the effect of this motion, if it were granted, would be, error upon the record, if the defendant were to plead that oyer of the copy only had been granted by rule of court, which would be equivalent to denial of oyer; that there were various ways in which the plaintiff might have proceeded—he might have applied to the court to have the bond itself delivered up—he might have obtained relief in equity—he might have declared upon the bond as being in the possession of the defendant—or he might have stated the fact on the record with respect to cancelling the bond; but that, as he had chosen to make a profert in court, oyer of the bond on which he had declared could not be dispensed with. Ashhurst, J., said: "I do not say that this court cannot in any instance grant such

1837.

Archbishop of CANTERBURY v. TUBB.

an application as the present; but, the better way will be for the plaintiff to amend his declaration, and state the circumstances to excuse the profert. As there is another way open, there is no reason why it should not be taken." If ever there was a case calling for the equitable interposition of the court, it was this case of *Matison* v. *Atkinson*. In *The Archbishop of Canterbury* v. *House*, Cowp. 140, the sole question before the court was, whether or not a creditor had a right to sue upon the bond in the name of the Archbishop. Lord Hardwicke, in *Greenside* v. *Benson*, 3 Atk. 248, had in effect decided the same thing. It is every day's practice to assign these bonds, where the Ecclesiastical Court thinks the circumstances of the case require it: it has always been understood that they are under the immediate control and superintendence of that court; and, if the judge there is satisfied that the administrator has done his duty, they will not permit the bond to go out of the custody of their officer. In the present case, it appears that the whole matter has been brought fully before the Prerogative Court, who have not thought fit to afford the creditor any facility for prosecuting his action. [*Tindal*, C. J.—The Archbishop would be liable for costs in the event of the defendant succeeding in the action. Should not his assent to the proceedings appear?] So far from that appearing, it is sworn, on the part of the defendant, that the bond has not been assigned to Crowley and Sharman, and that the action is brought without the privity or consent of the Archbishop, and that he is not indemnified. In *The Goods of Hall*, 1 Hagg. Rep. 139, an action at law being brought in the name of the Archbishop, on the administration bond, by the administrator de bonis non against the executors of the original administrator (the affidavits stating that it was against them solely, and not against the sureties), the court directed the bond given by the original administrator "to be attended with;" but only on security being given to indemnify the

1837.

Archbishop of CANTERBURY v. TUBB.

Archbishop against costs. The defendant is therefore at liberty to treat this as the case of a common plaintiff suing for his own benefit in his own name, and to treat the bond, as it appears upon the record, as a common money bond; and no instance can be found where the court has in such a case deviated from the ordinary course; nor is there any ground for holding the parties entitled to any favour. In *The Archbishop of Canterbury* v. *Tappen*, 2 Man. & Ryl. 136, which was an action of debt on the bond against a surety, the bond had been pronounced forfeited by the judge of the Prerogative Court—*Dovey* v. *Edwards*, 3 Add. Eccl. Rep. 68; and in *The Archbishop of Canterbury* v. *Robertson*, 1 Cr. & M. 690, it would seem that the bond was put in suit by the direction of the Ecclesiastical Court.

Wilde, Serjeant, in support of his rule.—The creditors in this case are precisely in the situation in which the party was in *The Archbishop of Canterbury* v. *House*. This is not an application made to stay the proceedings as having been improperly commenced; nor is there any complaint coming from the Prerogative Court, or any thing to shew that the bond has been unduly put in suit. It is the common case of cestui que trust bringing an action in exercise of a right given him by the statute. No case has been or can be cited to shew that an actual assignment of the bond ever takes place: the statute 22 & 23 Car. 2. c. 10, contains no provision on the subject. Lord Mansfield, in *The Archbishop of Canterbury* v. *House*, distinctly says: "To one who has *a right*, it is ex debito justitiæ to *grant* the liberty of suing in the Archbishop's name; to one who has *no* right, it is ex debito justitiæ to *refuse* it." The Archbishop could not deprive the parties of their right to sue on the bond. We do not seek, as was done in *Read* v. *Brookman* and others of the cases cited, to dispense with the giving of oyer; but to

1837.

Archbishop of CANTERBURY v. TOBB.

give the defendant the substantial benefit of oyer in the only mode practicable in this particular instance. The manner of giving oyer is mere matter of practice: all that is asked here, is, that the court will, in order to avert a total failure of justice, deviate in a very slight and immaterial degree from the accustomed course. In *Totty* v. *Nesbitt*, the plaintiff had no copy of the bond: and the language of Buller, J.—"All we can do for you is, to order that the production of a copy shall be oyer"—clearly shews that learned judge's impression to have been in favour of the course here suggested. Here, the defendant has been furnished with an official copy of the bond, which he has accepted, and paid for. In *Matison* v. *Atkinson*, where the rule to shew cause why giving oyer of a copy of the bond should not be deemed good compliance with the defendant's demand of oyer of the bond, was discharged, Ashhurst, J., observes: "I do not say that this court cannot in any instance grant such an application as the present; but the better way will be for the plaintiff to amend his declaration, and state the circumstances to excuse the profert. As there is another way open, there is no reason why it should not be taken." Here, however, no other way than that suggested is open to the parties: the bond is in existence, and capable of being produced. Justice demands that the slight dispensation prayed should be conceded.

TINDAL, C. J.—This certainly is a case of the first impression; and I regret that I have been unable to satisfy myself that we have authority to do that which is prayed. It seems to me that it would operate to enable the real plaintiffs indirectly to avail themselves of an excuse of profert, which, to enable the defendant to take the sense of the court as to its sufficiency, ought to appear upon the face of the record; and that we should in effect be determining, upon a mere motion on a point of practice, a most

1837.

Archbishop of CANTERBURY v. TUBB.

important right of the Prerogative Court—depriving that court of the power of deciding upon the propriety of allowing the administration bond to be put in suit or not. Lord Mansfield, it is true, in *The Archbishop of Canterbury* v. *House*, says, that, "to one who has a right (as a creditor), it is ex debito justitiæ to grant the liberty of suing in the Archbishop's name:" but that must be understood to mean, that the party shall have a right to put the bond in suit under proper restrictions; not without the leave of the Ecclesiastical Court, for, otherwise, the Archbishop would, without any act or default of his own, be rendered liable to costs to an immeasurable extent. To prevent a failure of justice, it seems to me that the proper course would be for the creditors to apply for a mandamus, when it would be seen whether or not the Ecclesiastical Court or the nominal plaintiff had any just grounds for resisting the production of the bond. But, at present, it seems to me that we are called upon to decide on the rights of parties who are not and cannot be before the court. The rule must therefore, I think, be discharged; but, inasmuch as the objection is very unreasonable, it must be without costs.

PARK, J.—I yield with great reluctance to the opinion that has been pronounced by my Lord Chief Justice. The objection on the part of the defendant is most frivolous and unjust.

BOSANQUET, J., concurred.

COLTMAN, J.—I am also of opinion that it is impossible to accede to this application. The court of Common Pleas can only sit at Westminster; and we cannot make any place out of Westminster a part of the court for any purpose whatsoever. If the creditor has a right to use the name of the Archbishop in a suit on the bond, then he

must have some means of compelling its production. I agree that the defendant's resistance to this application is unreasonable, and that therefore he is not entitled to costs.

1837.

Archbishop of CANTERBURY v. TUBB.

Rule discharged, without costs.

COX *v.* KING.

Friday, April 28th.

The commissioners under an inclosure act were empowered to divide and allot common lands among the proprietors of common lands in the parish, and to assign any messuages, buildings, lands, tenements, hereditaments, new allotments, and old inclosures, in lieu of or in exchange for other messuages, buildings, lands, tenements, hereditaments, new allotments, and old inclosures, so that such exchanges should be ascertained, specified, and set forth in the commissioners' award, or in some deed to be executed by them, and so that such exchanges be made with the consent *in writing* of the respective proprietors; with a proviso for an appeal to the quarter sessions, within six months after the cause of complaint should have arisen.

The commissioners, inter alia, allotted to Sir H. and Lady M., in respect of an estate in the parish, rented by A. W. and W. C., a piece of pasture land called Ludwell's Furze Close, containing about five acres, and another piece called Hill Close, late W. P.'s land, containing about four acres; and to W. P., a proprietor of meadow and arable land in the parish, in respect of his freehold estate, two acres of arable called Shortlands, late a common field, and sixteen acres of old inclosure called Stearts, late Sir H. M.'s. The award did not state that the several closes had been given in exchange for each other; but it concluded with an approval and confirmation by the commissioners of the exchanges made between Sir H. M. and W. P. There was no evidence of the consent in writing of Sir H. M. or W. P. to any exchange, save such assent as might be inferred from the award:—Held, that, in 1813, W. P. could not make a good title either to Stearts or to Shortlands, although they had been in his possession ever since the execution of the award in 1798.

THE following case was sent for the opinion of this court by the Master of the Rolls:—

John White Parsons, late of West Camell, in the county of Somerset, was from a period long anterior to and at the respective times of the passing of the act of parliament and of the execution of the award hereinafter mentioned seised of an estate in fee-simple of several closes, and, among others, of a close of meadow called Shortlands, containing by estimation three acres, and four acres and three yards, of arable land, lying dispersed at several places in the west field of East Camell.

An act of parliament was passed in the 34 Geo. 3, intituled, an act for the dividing, allotting, and inclosing the several open and common fields, common meadows, stinted pasture, and other commonable lands and grounds in the parish of East Camell, in the county of Somerset. By

1837.

Cox v. King.

that act—after reciting that there were situate within the parish and manor or lordship of East Camell, in the county of Somerset, several open and common fields, common meadows, and stinted pasture, called Camell Leaze, and other commonable lands and grounds, containing in the whole by estimation 650 acres, or thereabouts; that Sir Henry Poulett St. John Mildmay, and Dame Jane his wife, in her right, were lord and lady of the said manor or lordship, and that Francis Newman, John Goodford, a minor, Thomas Horner Pearson, clerk, vicar of the said parish, in right of his vicarage, John Barrett, Constantine Crobrow, John White, Abel Willis, Henry Morris, John Hockey, John Lamb Cook, Thomas Carew, and others, were owners and proprietors of all the said open and common fields, common meadows, and other commonable lands and grounds (except the said stinted pasture); that the said several owners and proprietors were also entitled to right of common thereon, during certain seasons of the year, and in certain shares and proportions; that the said Sir H. P. St. John Mildmay and Dame Jane his wife, in her right, were also seised of or entitled to the said stinted pasture called Camell Leaze, subject to the right of the said Sir H. P. St. John Mildmay and Dame Jane his wife, and of certain other persons, to stock and stint the same with cattle during a particular part of the year, and under certain restrictions; that the lands and grounds of the said respective owners and proprietors in the said open and common fields and common meadows, lay intermixed and dispersed in several places distant from each other, and in small parcels, and in that respect were very inconvenient; that the same and also the stinted pasture and other commonable lands and grounds in their then present situation were incapable of any considerable improvement, and it would be very advantageous to the several proprietors thereof and persons interested therein if the said open and common fields, common meadows, stinted pasture, and

1837.

Cox v. King.

other commonable lands and grounds were divided and inclosed, and specific parts and shares thereof allotted unto the said several proprietors and persons interested, in lieu of and in proportion as near as might be to their several and respective properties, rights, and interests—it was enacted (after appointing certain commissioners) that it should be lawful for the said commissioners, and they were thereby required, to set out, assign, allot, apportion, and divide the open and common fields, common meadows, stinted pasture, and other commonable lands and grounds thereby directed to be divided and inclosed, in manner following; that is to say, after setting out roads, &c., to set out, mark, ascertain, divide, and allot, by proper stakes, metes, and land-marks, all the residue and remainder of the said *open and common fields, common meadows, stinted pasture, and other commonable lands and grounds thereby directed to be divided and inclosed*, unto, among, and between the said Sir H. P. St. John Mildmay and Dame Jane his wife, in her right, F. Newman, J. Goodford, T. H. Pearson, in right of the said vicarage, J. Barrett, C. Crobrow, J. White, A. Willis, H. Morris, J. Hockey, J. L. Cook, T. Carew, their respective heirs, successors, and assigns, and all and every other the owners and proprietors of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds thereby directed to be divided and inclosed, in such quantities, shares, and proportions, and in such parts and shares as by the said commissioners should be adjudged and determined to be a just compensation and satisfaction for and equal to their several and respective lands, grounds, rights of common, stints, or cattle-gates, and other their rights and interests therein. Provided always, that the said commissioners should have due regard to the quality, situation, and convenience, as well as the quantity of the several allotments to be made by virtue of that act, and also to the situation of the messuages, buildings, and ancient inclosures of the

1837.

Cox v. King.

several proprietors to whom such allotments should be made, so as to lay the allotments as convenient and commodious to the said several proprietors as the general partition and exchange of property would, in the judgment of the said commissioners, admit of; and that the several lands and grounds to be set out and allotted unto and for the person or persons who by virtue of that act should be entitled to the same, should be *in lieu of and full satisfaction and compensation of and for his, her, and their several parcels of land, rights of common, stints, cattle-gates, and all other rights and interests whatsoever in and to the said open and common fields, common meadows, stinted pasture, and commonable lands and grounds thereby directed to be divided and inclosed* (save and except such rights and interests as were thereinafter particularly saved and excepted); that, when and as soon as the commissioners should have finished the said intended division and allotment of all the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds thereby directed to be divided and inclosed, they should prepare a draft of their award, which should express and specify the number of acres, roods, and perches, in statute measure, contained in the same lands and grounds, and also in the different plots and parcels thereof respectively which should be set out and allotted to each and every person and persons by virtue of that act, with the exact description of the situation, abuttals, and boundaries of the same, distinguishing the several tenures thereof; that the said award and all matters and things therein contained, and all such allotments of the said lands and grounds thereby directed to be divided and inclosed, as should be set out and allotted by the said award of the said commissioners, should be final, binding, and conclusive to all and every person or persons interested therein, their and every of their heirs, executors, administrators, successors, and assigns respectively: provided always that the guardians,

1837.

Cox v. King.

husbands, trustees, committees, or attorneys, or persons acting as guardians, trustees, committees, or attorneys of or for any person or persons, being minors, under coverture, lunatics, beyond the seas, or otherwise incapable by law to accept of their respective allotments, might, and they were thereby enabled and required to accept thereof for the use of such person or persons so incapacitated as aforesaid.

And for the more convenient situation of the several farms, lands, allotments, and estates within the parish and manor aforesaid, upon the said division and inclosure, it was enacted that it should be lawful for the said commissioners, and they were thereby authorised and empowered, to assign, set out, allot, and award *any messuages, buildings, lands, tenements, hereditaments, new allotments, and old inclosures within the said parish and manor, in lieu of* or *in exchange for any other messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures within the same parish, or any adjoining parish, township, or place, so that all such exchanges should be ascertained, specified, and set forth in the said award of the said commissioners, or in some deed or deeds to be executed by the commissioners, and inrolled or entered in the same place and manner as the said award, at any time within two years next after the date and execution of the said award; and so that such exchanges should be made by or with the consent of the respective owners, proprietors, or other persons seised or possessed of or interested in the lands or other premises which should respectively be so exchanged as aforesaid,* or of the husbands, guardians, trustees, committees, or attorneys for or on behalf of any such owners, proprietors, or other persons respectively, who should be under coverture, minors, lunatics, or beyond the seas, or under any other disability or incapacity of acting for themselves; *such consent to be testified by writing under their respective hands;* and so that all such exchanges

1837.

Cox
v.
King.

of any messuages, lands, tenements, tithes, or other hereditaments belonging to the vicarage of East Camell aforesaid, or any other ecclesiastical benefice, should be also made with the like consent in writing of the lord bishop of the diocese for the time being: and all exchanges so made should be for ever good, valid, and effectual in law to all intents and purposes whatsoever, notwithstanding the want of sufficient title in the exchanging parties, or any will, settlement, limitation, or incumbrance affecting the premises which should be so exchanged as aforesaid: provided always, that, if any person or persons should think him, her, or themselves aggrieved by any matter or thing done in pursuance of that act (other than and except by such orders and determinations, matters, and things to be made and done by the said commissioners as were thereinbefore declared to be final, binding, or conclusive), then and in every such case, he, she, or they might appeal to any general quarter sessions of the peace which should be held in and for the county of Somerset within six calendar months next after the cause of complaint should have arisen.

The said John White, in the act named, afterwards assumed the surname of Parsons, and was the John White Parsons hereinbefore mentioned.

The said commissioners made their award by a deed-poll, under their hands and seals, bearing date the 23rd January, 1798, which deed-poll—after reciting, among other things, that the commissioners had made a just and impartial estimate of the value thereof, and of the respective rights of the owners and proprietors concerned and interested therein, and had deliberately heard, examined, and considered the several allegations made before them at their several meetings by and on the behalf of all the parties interested, and had duly informed themselves of the rights and claims of the several proprietors, and of all other matters and things relating to the said division

1837.

Cox v. King.

and allotment necessary and proper to be weighed and considered in order to do justice to all parties concerned therein, and had settled, ordered, completed, and finished the divisions and allotments of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds directed by the said act to be divided and allotted, and had caused the said several allotments to be severally admeasured, set out, dug, fenced, planted, and allotted unto and amongst the several owners and proprietors interested therein, in proportion to their several rights, shares, and interests therein; and that, in making such allotments, due regard was had, as well to the qualities, conveniences, and situations, as to the quantities of land contained therein respectively, and also to the situation of the messuages, buildings, and antient inclosures of the several proprietors to whom such allotments had been made, so as to lay the same as convenient and commodious to the several proprietors as the general partitions and exchange of property would, in their judgment, admit, and, according to the true intent and meaning of the said act—did, amongst other allotments, set out and allot unto Sir H. P. St. John Mildmay and Dame Jane his wife, for and in respect of an estate in the said parish rented by Abel Willis of the said Sir H. P. St. John Mildmay and Dame Jane his wife, among other lands, one close of pasture called Ludwell's Furze Close, late Mr. White Parsons's land, containing five acres, one rood, and sixteen perches, lettered and numbered in the plan W. A. 467. It also allotted unto the said Sir H. P. St. John Mildmay and Dame Jane his wife, for and in respect of an estate in the said parish then or lately rented by W. Canning of the said Sir H. P. St. John Mildmay and Dame Jane his wife, one close of arable land called Hill Close, late said Mr. White Parsons's, containing four acres and four perches, lettered and numbered in the plan C. B. 457. It also allotted unto the said John White Parsons, in respect of

Allotment to Sir H. Mildmay.

Allotment to Parsons.

1837.

Cox v. King.

his freehold estate, two allotments of old inclosure, late Sir H. Mildmay's, called South Stearts, containing sixteen acres, one rood, and thirty-nine perches, lettered and numbered in the plan W. 463 and 364; also one allotment of arable land called Shortlands, late a common field, containing two acres, three roods, and twenty perches, lettered and numbered in the plan W. 372.

Consent, approval, and confirmation of exchanges.

The award contained also the following passage:—"And we do hereby consent to, approve of, and confirm the several exchanges made between the said Sir H. P. St. John Mildmay and Dame Jane his wife, and the said J. W. Parsons, and also of all other exchanges made between any of the proprietors and owners of land in the said parish of East Camell, the same being in our judgment reasonable and adequate."

Inrolment of award.

The award was inrolled with the clerk of the peace of the said county of Somerset on the 25th August, 1814. There was no evidence of the assent in writing of the said Sir H. P. St. John Mildmay and Dame Jane his wife, or either of them, or of J. W. Parsons, to any exchange, save as such assent might be inferred from the award itself.

The said J. W. Parsons entered into the possession or receipt of the rents and profits of the additional two acres, three roods, and twenty perches of land called Shortlands, and the said sixteen acres, one rood, and thirty-nine perches of land called the Stearts, immediately after the said award, and continued in possession thereof until the time of his death. The said J. W. Parsons, on the 23rd September, 1808, by his last will and testament, duly executed and attested for passing real estates, devised all his real property to trustees, in trust to sell the same for the payment of debts and charges, and died shortly after the date of his will, without having revoked or altered it, leaving H. W. Parsons his heir at law. The trustees named in the will proved the will on the 17th May, 1809

Death of Parsons.

(the executors having renounced), and entered into the possession or receipt of the rents and profits of all the said lands called Shortlands and the Stearts, and ever since continued and still are in such possession or receipt as such trustees.

Sale.

In pursuance of an order of the court of Chancery, the Master, on the 7th April, 1813, caused to be offered for sale by public auction certain lands and hereditaments of the said J. W. Parsons, in five lots, and among them, in lot 1, the said close of arable land called Shortlands, containing by estimation six acres, more or less, and the said two closes of pasture land called the Stearts, containing by estimation sixteen acres, more or less. William Leonard Thomas Pyle Taunton, Esq., became the purchaser of the said lot 1.

Reference to Master.

By an order of the court of Chancery, bearing date the 23rd February, 1819, it was referred to the Master to whom this cause stood referred to inquire whether the plaintiffs in the cause could make a good title to the said premises so purchased by Mr. Taunton. The Master, by his report made in this cause, bearing date the 7th May, 1835, in pursuance of the said order of the 23rd February, 1819, certified that he was of opinion that the plaintiffs could make a good title to the premises purchased by Mr. Taunton.

Master's Report.

Purchaser's objections.

Mr. Taunton objected to the said report, "because, as to two closes or pieces of land, part of the lands comprised in the purchase and particulars of sale, described as two closes of pasture land called the Stearts, no title was adduced, except under the award of the said commissioners, made within sixteen years next before the purchase; that no power was given to the said commissioners by the said act of parliament to allot or award any old inclosure to any person in respect of any freehold estate he might have had in the said parish, but only in lieu of or in exchange for some other messuages, buildings, lands,

1837.

Cox
v.
King.

tenements, hereditaments, new allotments, or old inclosures within the said parish, or some adjoining parish, township, or place; that, by the said act, it was expressly provided that all such exchanges should be ascertained and set forth in the award of the commissioners, or in some deed or deeds to be executed by the commissioners, and inrolled or entered in the same place and manner as the said award; that, by the said act, it was also expressly provided that all such exchanges should be made with the consent of the respective owners, proprietors, or other persons seised or possessed of or interested in the lands or other premises which should respectively be so exchanged, or of the husbands, guardians, trustees, committees, or attorneys for or on behalf of any such owners, proprietors, or persons who were under coverture, minors, lunatics, or beyond the seas, or under other disability or incapacity of acting for themselves, and that such consent should be testified by writing under their respective hands; that it did not appear that any exchange in respect of the said two allotments of old inclosure called the Stearts was made or intended by the said commissioners in or by the said award, or that any such exchange was ascertained, specified, or set forth therein, or in any deed or deeds executed by the said commissioners, inrolled or entered in the same place and manner as the said award, at any time within two years next after the date and execution of the said award, as required in and by the said act as aforesaid; that it did not appear that any messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures within the said parish and manor of East Camell, were assigned, set out, allotted, or awarded in lieu of or in exchange for the said two allotments of old inclosures called the Stearts, nor did it appear that any such consent of the respective owners, proprietors, or other persons seised or possessed of or interested in the lands or other premises which might be alleged to have been so respec-

tively exchanged or intended to be exchanged as aforesaid, or of any such husbands, guardians, trustees, committees, or attornies as aforesaid, as was required by the said act, was at any time given or testified in writing under the hand of the said Sir H. P. St. John Mildmay, to whom the said two allotments were stated to have belonged, or under the respective hands of the respective owners, proprietors, or other persons seised or possessed of or interested in the lands or other premises which might be alleged to have been respectively so exchanged as aforesaid, or of any such husbands, guardians, trustees, committees, or attornies as aforesaid."

The question for the opinion of the court was—Whether the vendors could, under the award of the commissioners, and the act of parliament, make a good title to the said closes, pieces or parcels of land called the Stearts and Shortlands. Question.

The case was argued in the course of this term.

Wilde, Serjeant, on behalf of Mr. Taunton, relied on the objections above stated, and contended that not only must title be shewn in respect of the land allotted, but also in respect of the land for which the allotment is made. In *Casamajor* v. *Strode*, 2 Mylne & K. 706, an inclosure act which recited that W. Strode was entitled, as lord of a manor, to the soil and royalties, and, as lay rector, to all tithes within the manor, and that he claimed right of common on the waste in respect of the soil and royalties, directed certain allotments to be made to him in compensation for his right to the soil of the waste, and to the tithes, and that the residue of the waste should be divided among Strode and the other persons having right of common upon such waste, in proportion to their respective claims; and it reserved to the lord the seignory and royalties: the act made no mention of any right of warren existing in the lord; but there was some evidence that Strode had used

1837.

Cox v. King.

part of the waste as a rabbit-warren: the award gave an allotment to Strode for his right of warren, and also three other allotments which purported to be made for his right to the soil, his right to the tithes, and his right of common and other rights and interests in the waste, respectively; which allotments were declared to be a full compensation for all his right and interest in the lands directed to be inclosed: it was held, that Strode's title to the warren allotment was not such as a purchaser could be compelled to take. There, there had been twenty years' possession, and reliance was placed on the statute of limitations. Here, the award was made in the year 1798, and the contract out of which the present suit arose was entered into in 1813. *Phillipps* v. *Maile*, 7 Bing. 133, 4 M. & P. 770, which was cited in *Casamajor* v. *Strode*, was over-ruled by the case of *The Bailiffs of Godmanchester* v. *Phillipps*, 2 Nev. & M. 713, 5 B. & Ad. 198. There, in trespass for breaking and entering the close of the corporation of G., the defendant's pleas set out an act for inclosing commonlands in B., which recited that the corporation, as lords of the manor, were owners of the soil, and other persons were proprietors of lands over which rights of common were exercised; the commissioners were directed to make certain allotments to such lords and proprietors, and it was enacted that they should set out as a common pasture, out of certain commons in G. called the E. and W. commons, such plots of land as should be a full compensation for the rights of common of all the owners and proprietors of commonable messuages, for such messuages only; and that such plots of land should be used, stocked, and enjoyed by such owners and proprietors, and their respective tenants and occupiers of the said messuages only, as a common pasture, in such manner as the commissioners should direct: parties dissatisfied were to bring actions within three months against persons in whose favour the award should be made, or appeal within six months to the

1837.

Cox v. King.

sessions against the award; but, in default of such action or appeal, the award to be final. The commissioners allotted a plot of ground in the W. common, as a common pasture, to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages, and their respective tenants and occupiers of the said messuages only having right of common upon the said common of G.; and they stinted the common, as empowered by the act. The commissioners also (inter alia) allotted lands to the corporation in respect of their interest as lords of the soil in G. The right of common had always been, up to the passing of the act, in the occupiers of commonable messuages, being freemen of G. After the act, a party, being the proprietor and occupier of one of the commonable messuages, but not being a freeman of the borough, put his beasts upon the common; whereupon the corporation brought trespass against him more than six months after the passing of the act. Upon demurrer, the court held, that the act did not change the nature of the rights of common, by giving them to the owners of commonable messuages, who were not burgesses, and therefore that the commissioners had no power to create such new rights; and that the language of the award had no other effect than to ascertain the spot on which the right was to be exercised, without altering the nature of the right; and that the action was therefore well brought, though more than six months had elapsed since the making of the award. In *Wingfield* v. *Thorpe*, 10 B. & C. 785, the commissioners under an inclosure act were required to allot the lands directed to be inclosed unto the several proprietors thereof, in such shares, quantities, &c., as they should adjudge to be a just compensation for their several and respective lands, rights of common, &c. therein; and were empowered also to set out, allot, and award any lands, &c., within the parish of Kennett, "in lieu of or in exchange for any other lands, &c., within the said parish,

1837.

Cox v. King.

provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the lands exchanged." The commissioners awarded a certain allotment to S. Hunt, "as a compensation for his open field, lands, and right of common, *and* an old inclosure given by S. Hunt to be allotted by the commissioners in exchange:" it was held, that the commissioners had not pursued the powers vested in them by the act, and that S. Hunt could not make a good title to the allotment. Here, the Stearts are not set out in the award as given in exchange for land of Parsons: there is no consent in writing for the exchange; and the common land called Shortlands is given to Parsons in respect of his freehold estate, and not in satisfaction of his land and rights of common, &c., in the common fields.

Willcock, contrà.—By the act the commissioners are directed to make a common fund of the property in the parish; the old inclosures as well as the rights of common are to be dealt with for making a more advantageous distribution. The question is not now, whether the consent was in fact given, but whether it must not be presumed that the officers appointed by statute, saw, as the award alleges, that the consent was given at the time. The exchanges must have preceded the execution of the award. [*Tindal*, C. J.—It must be presumed that the commissioners have acted fairly in making the allotments; the question is, whether they have ascertained them: with a view to charges affecting the property of the original owners, it is of extreme importance that the exchanges should be ascertained. What land is given in exchange for the Stearts?] Ludwell's Close and Hill Close. [*Tindal*, C. J.—How does it appear that those two fields only are given in exchange? The award says that Ludwell's and Hill Close are given, but it does not state for what.]

1837.

Cox v. King.

The award must be construed according to the antient custom of the parish. Shortlands was, it appears, a common field; and, reddendo singula singulis, Shortlands must be taken to have been allotted in respect of the rights of common, and the Stearts in respect of the exchange. With regard to the consent, the acts of the commissioners are to be accredited; they would have been guilty of a violation of their duty had they proceeded to make their award without having before them the requisite consents in writing. The absence of an appeal is evidence to shew that the commissioners have done their duty; the court will not presume that they have not—*Rex* v. *The Inhabitants of Haslingfield*, 2 M. & S. 558, *Williams* v. *The East India Company*, 3 East, 192. After the lapse of thirty-nine years, the deaths of Sir Harry and Lady Mildmay may be presumed. In *Rex* v. *Washbrook*, 4 B. & C. 732, the land was held contrary to the provisions of the award; here, in conformity with them. In *Thorpe* v. *Cooper*, 2 M. & P. 245, 2 Y. & J. 445, 5 Bing. 116 (in error from the King's Bench—*Cooper* v. *Walker*, 6 D. & R. 31, 4 B. & C. 36), by an inclosure of 1769, commissioners were directed to allot to the rector of Waddingham cum Snitterby such parcel of the arable fields and common pastures within the township of Snitterby, and also of the titheable parts of the township of Waddingham, as should (quantity, quality, and situation considered) be equal in value to two fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within the same lands and grounds; and the award of the commissioners was to be final unless appealed against within six months; and immediately after the inrolment of the award, all tithes arising within the lands or grounds directed to be inclosed, were to be extinguished: saving, however, to every person and persons, and their heirs (other than those to whom allotments should be made in respect of their several

1837.

Cox v. King.

interests), all such estate and interest as they had in respect of the lands before the passing of the act. The commissioners, by their award, allotted to the rector land in lieu of his glebe lands in Waddingham, and in lieu of glebe and tithes in the townships of Snitterby and Atterby; but there was no specific allotment in lieu of the tithes in Waddingham. It was held, that, as the commissioners had made no allotment in lieu of such tithes, the rector's right to the tithes in kind was reserved to him by the saving clause in the act, and that he was not barred from suing for them fifty-six years after the act had passed.

Wilde, Serjeant, in reply, contended that the act gave the commissioners no such authority as they had assumed; and that the award did not contain any assertion of the consent of the several owners to the exchanges ordered.

The following certificate was afterwards sent to his Honor the Master of the Rolls:—

"This case has been argued before us by counsel; we have considered it, and are of opinion that the vendors cannot, under the said award of the commissioners and the said act of parliament, make a good title to the said closes, pieces, or parcels of land called the Stearts and Shortlands.

"N. C. TINDAL.
"J. A. PARK.
"J. B. BOSANQUET.
"T. COLTMAN."

1837.

Monday, May 8th.

TOLSON, Demandant; FISHER, Tenant.

In a writ of formedon, the court allowed the tenant to withdraw a demand of view, on payment of costs, after the demandant had counterpleaded thereto that the tenant was in possession of the land demanded by the writ, and of none other in the parish.

THIS was a writ of formedon. The tenant having in December last demanded a view, the demandant put in a counterplea that the tenant was in possession of the land demanded by the writ, and of none other in the parish. The tenant finding that he could neither take issue on the counterplea nor demur with any chance of success (*a*)—

Stephen, Serjeant, on a former day in this term, moved for a rule calling on the demandant to shew cause why the tenant should not be at liberty to withdraw the demand of view, and have a month's time to plead. He cited *Twining*, Dem., *Lowndes*, Ten., 2 New Cases, 133, 2 Scott, 260, where, in a writ of right, the tenant demurred to the count for a supposed deficiency in the statement of the descent; and the court, after argument, permitted him to withdraw his demurrer and plead de novo: saying —"All the cases on the subject of amendments in writs of right apply to amendments sought on the part of the demandant; and the principle upon which they have almost invariably been refused is this, that the court will afford no encouragement or assistance to one who seeks to disturb an antient possession. An amendment by the tenant stands upon a very different footing." He also prayed a rule for the demandant to deliver a particular of what he was proceeding for.

A rule nisi was granted for the withdrawal of the demand of view, the tenant having time to plead till the first day of Trinity Term; but refused as to the rest, *Tindal*, C. J., observing that it was too late, now that the writ of formedon was on its deathbed, to ask the court to strike out a line of practice confessedly novel.

(*a*) See Davis v. Lees, Willes, 344.

1837.

TOLSON Dem., FISHER Ten.

Wilde, Serjeant, now shewed cause.—It does not appear from the affidavit upon which this rule was obtained, that the tenant, at the time he demanded a view, was ignorant of the particular lands sought to be recovered in this action. His object in demanding a view was merely to delay the demandant. The indulgence now asked is one that is not usually granted in any course of proceeding; and least of all in a real action. The sole object of a demand of view is, to enable the tenant to plead a dilatory plea.

TINDAL, C. J.—The tenant is entitled as of right to have a view where he holds lands under different titles in the parish mentioned in the writ. I think the rule should be made absolute, on payment of costs.

Rule absolute accordingly.

Saturday, April 15th.

The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution.

STOCKEN *v.* WEDDERBURNE.

TALFOURD, Serjeant, moved that the defendant might be charged in execution at the suit of the plaintiff in this cause. The prisoner was brought up by habeas corpus, and a doubt was entertained as to whether the uniformity of process act, 2 Will. 4, c. 39, s. 8, had not altered the practice in this respect, by substituting the ca. sa. for the habeas corpus. The learned Serjeant submitted that the statute merely applied to the mode of declaring against prisoners, and not to the process for charging them in execution.

PER CURIAM.—The proper course seems to have been pursued. Let the prisoner stand charged. He will go back to the King's Bench with a detainer at the suit of the present plaintiff.

Rule accordingly (*a*).

(*a*) See the next case.

1837.

Saturday, Nov. 25th.

WHITMORE *v.* BINNS.

The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution.

A RULE nisi was on a former day obtained by *Wordsworth* to set aside a habeas corpus, by which the defendant in this case had been charged in execution, on the grounds, that, since the uniformity of process act, 2 Will. 4, c. 39, the proper mode of charging a prisoner in execution was by writ of ca. sa., and not by habeas corpus—*Millard* v. *Millman*, 3 M. & Scott, 63; and that the defendant had been charged in execution for 402*l.*, the judgment being for 202*l.* only.

Peacock now shewed cause.—In Tidd, 9th edit., 364, the practice is thus stated: "If the defendant be not detained in custody at the suit of the same plaintiff, the proper mode of proceeding is, to sue out a writ of habeas corpus ad satisfaciendum, and bring the defendant into court thereon, in order to charge him in execution." Now, by the 2 Will. 4, c. 39, s. 8, it is enacted, "that, when it shall be intended to detain in any such action any person being in the custody of the marshal of the Marshalsea of the court of King's Bench, or of the warden of the Fleet Prison, the process of detainer shall be according to the form of the writ of detainer contained in the said schedule, and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said marshal or warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said courts, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said marshal or warden, as the fact may be, and the *proceedings* shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by

1837.

WHITMORE v. BINNS.

some rules to be made by the judges of the said courts." All that was determined in *Millard* v. *Millman*, was, that this court may issue a writ of detainer directed to the marshal of the King's Bench. So, it has been held that the court of King's Bench may issue such writ directed to the warden of the Fleet—*Barrett* v. *Harris*, 2 Dowl. 186. But the uniformity of process act applies only to process for the commencement of actions, and in no respect alters the course of proceedings subsequent to the judgment.

Wordsworth, in support of his rule.—The question turns upon the meaning of the word "proceedings" in the 8th section of the 2 Will. 4, c. 39—whether it applies generally to the proceedings throughout the suit, or only to proceedings anterior to the judgment. The latter construction will be productive of great and unnecessary expense and inconvenience.

TINDAL, C. J.—Upon the true construction of the 2 Will. 4, c. 39, s. 8, I have no hesitation in holding it not to apply to this case. That statute was not intended to effect any alteration in the mode of proceeding to charge a defendant in execution. The defendant is already in the custody of the court. The marshal or the warden could not take notice of a writ of ca. sa. directed to the sheriff.

The rest of the Court concurring, the rule was made absolute to reduce the sum mentioned in the writ to 202*l.*, the larger sum appearing to have been inserted by mistake; the defendant undertaking to bring no action.

Rule accordingly.

1837.

PIGOU *v.* DRUMMOND.

BY indenture of lease and release of the 25th and 26th of August, 1826, the release being made between John Easthope and Frederick John Ryan, of the first part, the defendant of the second part, A. B. Drummond and John Drummond of the fourth part, and Jemima Pigou the fifth part, in consideration of 3,000*l.* paid by Jemima Pigou to Frederick John Pigou and John Easthope, certain fee-farm rents therein particularly described, and producing the net annual sum of 206*l.* or thereabouts, were conveyed unto and to the use of the said Jemima Pigou, her heirs and assigns, for ever, subject to redemption on payment by the defendant of the sum of 3,000*l.* and interest at 5 per cent. per annum, at the terms and in manner therein mentioned; and in the indenture of release or mortgage was contained a covenant on the part of the defendant for payment of the said sum of 3,000*l.* and interest at the time and in manner therein mentioned. The said sum of 3,000*l.* and interest was not, nor was any part thereof paid according to the proviso and covenant in the indenture of mortgage; and in November, 1829, there was due and owing to Jemima Pigou the sum of 3,450*l.* for principal and interest on the mortgage. About that time, a treaty took place between the defendant's solicitor and the solicitor of Jemima Pigou for the absolute sale by the defendant of these fee-farm rents to Jemima Pigou, which terminated in a written contract between them for their sale to Mrs. Pigou for the sum of 3,785*l.*, out of which 3,450*l.* so due for principal and interest as aforesaid were to be deducted and retained by Mrs. Pigou. Whilst the investigation of the title of the defendant to the said fee-farm rents was proceeding, that is, in or about the month

The defendant mortgaged to one J. P., for 3000*l.*, certain fee-farm rents. The principal being unpaid, and 450*l.* being due for interest upon the mortgage, a written contract was entered into between the defendant and J. P. for the sale to the latter of the rents in question for 3,785*l.* Pending the investigation of the defendant's title J. P. died, leaving the plaintiff her executor and residuary legatee. After the draft conveyance had been settled and approved, the defendant being abroad, the plaintiff, without any notice either to the defendant or to his attorney (though he knew that the defendant was abroad, and that he had an attorney acting for him here), made affidavit that the defendant was indebted to him as the executor of J. P. in the sum of 3,550*l.* and upwards, for principal and interest, and sued out a capias, and caused it to be delivered to the sheriff with directions to return it non est inventus, and thereupon caused the defendant to be outlawed:—The court reversed the outlawry, with costs.

1837.

PIGOU v. DRUMMOND.

of July, 1832, Mrs. Pigou died, having first made and published her last will, and thereby appointed the plaintiff, R. R. Pigou, the executor and residuary legatee. In January 1834, the plaintiff received from Samuel Harding, the defendant's receiver, the sum of 500*l.*, and of the arrears of the fee-farm rents which had been got in and collected by the receiver on account of the defendant. Notwithstanding the contract for the purchase of the fee-farm rents had never been abandoned by the plaintiff, but, on the contrary, the draft of a conveyance having been sent by his solicitor to the defendant's solicitor for his perusal and approval, which draft was settled, approved, and returned by the latter to the plaintiff's attorney, yet the plaintiff, without any notice whatever, either to the defendant or to his attorney, on the 17th of May, 1834, made an affidavit of debt, whereby he deposed that the defendant was indebted to him, as executor of Jemima Pigou, in the sum of 3,550*l.* and upwards for principal and interest due from him upon his covenant in that behalf contained in the before-mentioned indenture of release or mortgage; and, on the 17th of May, issued a writ of capias against the defendant, directed to the sheriff of Middlesex, and indorsed for bail for 3,550*l.* and upwards, by affidavit, and also indorsed—"capias to outlawry, *to be returned non est inventus.*" On the 2nd June, 1834, the sheriff accordingly returned non est inventus. At the time the plaintiff made the above affidavit, and at the time of the writ of capias, the defendant was, and had then for two years and upwards been residing near Brussels, his attorney having been during all that period in the habit of writing to and receiving letters from him from that place. At the time of the issuing of the writ of capias, it was well known to the plaintiff's attorney that the defendant was beyond the seas, he having, on the 24th May, given the defendant's attorney notice of an intended application to the court for security for costs in a case of *Drummond* v. *Pigou*, on the ground of the plaintiff's (the defen-

1837.

PIGOU v. DRUMMOND.

dant in this cause) absence from England. On the 27th, such rule was obtained, and afterwards made absolute. On the 31st October, the plaintiff also obtained an order of the Master of the Rolls, requiring the defendant to give security for costs in the suit there.

The defendant's attorney having discovered the fact of the proceedings to outlawry, on the 24th October filed a bill in Chancery against the plaintiff, praying for a specific performance of the contract, and for an injunction to restrain the plaintiff from further prosecuting his outlawry, and all further proceedings at law in this or any other action against the defendant; whereupon an order was made by the Master of the Rolls on the 10th November, by which it was ordered (the defendant by his counsel undertaking to give judgment in the action at law commenced against him by the plaintiff, in the sum of 4,000*l.*, to be dealt with as the court should think fit at the hearing of the cause) that an injunction should be awarded to restrain the plaintiff from taking any further proceedings in the action at law, or from further prosecuting the process to outlawry instituted by him against the defendant, or prosecuting any other action at law against the defendant in respect of the matters in the bill complained of. Upon searching at the proper office of this court, the defendant's attorney found that the defendant had been declared an outlaw upon the process so sued out and prosecuted by the plaintiff in this action. At the hearing of the motion made on the part of the defendant before the Master of the Rolls for an injunction, it was admitted by the plaintiff's counsel that the contract for the purchase of the fee-farm rents was a good and subsisting contract. On the 11th November instant, the defendant's attorney wrote to the plaintiff's attorney, requesting him to consent to a reversal of the outlawry, in order to obviate an application to this court; to which the plaintiff's attorney refused to accede, though he admitted that further

1837.

PIGOU v. DRUMMOND.

proceedings thereon had been stayed substantially by the injunction.

Upon an affidavit of these facts; and also stating that, instead of the defendant being indebted to the plaintiff in the sum of 3,550*l.* and upwards, as sworn to by the plaintiff, the latter was in fact indebted, at the time the affidavit was sworn, to the former in the sum of 562*l.* 8*s.* 4*d.*—

Wilde, Serjeant, obtained a rule calling upon the plaintiff to shew cause why the outlawry should not be reversed, with costs.

Talfourd, Serjeant, shewed cause, contending that there was nothing in the circumstances disclosed by the affidavit upon which the motion was founded to negative the plaintiff's right, or to shew that he had not reasonable grounds for proceeding to outlaw the defendant; and therefore, that, if the court, under the circumstances, thought the outlawry ought to be reversed, it could only be upon the usual terms, viz. on payment of costs.

Wilde, Serjeant, was heard in support of his rule.

PER CURIAM.—Under the peculiar circumstances of this case—the pendency of the negotiation between the parties for the purchase and sale of the fee-farm rents, the plaintiff's cognizance of the fact of the defendant's absence and that he was represented by an attorney in this country, and the unjustifiable and improper course pursued by the plaintiff in procuring the sheriff to return non est inventus to the capias utlagatum—we think the rule for reversing the outlawry at the expense of the plaintiff should be made absolute; the defendant undertaking to enter a common appearance pursuant to the order in equity, to ac-

cept a declaration for the mortgage money, and to suffer judgment in this action by nihil dicit for 4,000*l.* 1837.

Rule absolute accordingly (*a*).

(*a*) The report of this case, ante, Vol. 1, p. 264, not disclosing the specific facts upon which the motion to reverse outlawry was founded, and the case having repeatedly been cited as an authority to shew that the simple fact of the plaintiff's knowledge of the defendant's being abroad and of his being represented by an attorney here, was ground for setting aside the proceedings with costs; it has been deemed advisable to give an amended report of the decision, with a full statement of the facts, and the special form of the rule.

TOLSON, Demandant; WATSON, Tenant. *Saturday, May 6th.*

FORMEDON. The writ issued on the 30th May, 1835. The demandant counted on the 28th April, 1836. On the 4th May, 1836, the tenant prayed a general imparlance; and a day in court was given, in the first four days of Trinity Term—which commenced on the 23rd May, the 22nd being Sunday. On the 25th May (before the expiration of the imparlance), the tenant applied by summons to a judge at chambers for time to plead. The learned judge only granting a fortnight, and proposing to exclude the tenant from a view, the latter declined to act upon the order, and afterwards (within the first four days of the term, viz., on the 26th of May), in order to gain more time, demanded a view. The tenant not appearing in court on the dies datus, the demandant, treating the demand of view as a nullity, on the 7th June issued a petit cape (which is equivalent to signing final judgment), returnable on the 30th October. On the 25th October, application was made to Park, J., at chambers, to set aside the petit cape for irregularity. The learned judge ordered

In formedon, where the demand of view is objected to upon any ground arising on matter of fact, the proper course for the demandant is, to put in a counter plea, if upon matter of law, to demur: but to issue a petit cape is irregular.

Quære, whether a view can be demanded after a general imparlance?

1837.

TOLSON Dem., WATSON Ten.

the proceedings to be stayed until after the expiration of the first four days of Michaelmas Term. The tenant was summoned in August.

Stephen, Serjeant, in Michaelmas Term last, obtained a rule calling upon the demandant to shew cause why the petit cape should not be set aside for irregularity with costs, and why the tenant should not have a view. The irregularities pointed at were—that the petit cape was improperly issued after the demand of view—that there was no indorsement of the time to plead on the count—and that no demand of plea had been given. He cited Rast. Ent. 376. b.; Jenk. Cent. 130; Bro. Abr. 303, *View*, pl. 1; Com. Dig. *Pleader*, (2 Y. 3); *Brook* v. *Groves*, Hutton, 28; and 2 Wms. Saund. 45 *f*, *g*.

Wilde, Serjeant, and *Manning*, now shewed cause.—The regularity of the petit cape depends on the regularity of the demand of view, and on the tenant's right under the circumstances to demand it. The view was demanded during the currency of the imparlance. This, the parties not being then in court, was clearly irregular, even supposing (which is denied) that a view could be demanded after a general imparlance. Under these circumstances, the demandant being deprived of the opportunity of counterpleading, the only course open to him was, to issue a petit cape. It is clear that, after an imparlance, the tenant is not entitled to a demand of plea, or to plead a dilatory plea; and the sole object of the view is, to enable him to plead a dilatory plea.

The demand of view is clearly irregular upon two grounds—first, that it is made after a general imparlance—secondly, that it is made before the day in court.

That no view can be had after a general imparlance, where land is demanded, is clear upon the authorities. Since the statute Westminster 2, c. 48 (13 Edw. 1), a view

1837.

TOLSON Dem., WATSON Ten.

is granted only where the party is entitled to plead non-tenure or joint-tenure: "For view of land it is ordained and provided, that, from henceforth view shall not be granted but in case when view of land is necessary: as, if one lose land by default, and he that loseth moveth a writ to demand the same land. And in case when one by an exception dilatory abateth a writ after the view of the land, as by non-tenure, or misnaming of the town, or such like, if he purchase another writ, in this case, and in the case before mentioned, from henceforth the view shall not be granted, if he had view in the first writs. In a writ of dower, where the dower in demand is of land that the husband aliened to the tenant or his ancestors, where the tenant ought not to be ignorant what land the husband did aliene to him or his ancestor, though the husband died not seised, yet, from henceforth, view shall not be granted to the tenant. In all writs also where lands be demanded by reason of a lease made by the demandant, or his ancestor, unto the tenant, and not to his ancestor, as that which he leased to him, being within age, not whole of mind, being in prison, or such like, view shall not be granted hereafter; but, if the demise were made to his ancestor, the view shall lie as it hath done before." Of the six authorities that were cited on this motion, on the part of the demandant, one only, viz. Dyer, 210. b., relates to view. *Brook* v. *Groves* was in the nature of an assize of nuisance, which is totally different from the case of a view in a writ of land: of the two cases there cited from the Year Books, the first decided nothing, and the second only shews that view lies in a quod permittat. The sole object of the demand of view is, to enable the tenant to plead non-tenure or joint-tenure, and these, being dilatory pleas, are not pleadable after a general imparlance. In the Year Book, E. 63, pl. 3, 4, it is said: Belknap vient al barre, et demand le view; le demandant dit, per Perle, q'il avoit

1837.

TOLSON Dem. WATSON Ten.

prise jour per parce pretium, et que il est oustre de view." In Fitzherbert's Abridgment, *View*, pl. 56, in a præcipe quod reddat, after a prece parcium from one term to another, the tenant demanded a view, and Finchden held that he could not be permitted to allege non-tenure &c. Again, pl. 142, it is said "Apres prece parcium, le tenant naver le view." In Dyer, 210. b. (S.C. Moore, 32, pl. 117), "it was moved for a question whether a man in a plea of land shall have the view after a general imparlance or not: and by the opinion of the court he shall not have it, for he takes notice of the land upon himself; and therefore he shall not plead non-tenure or joint-tenancy after the imparlance. But, Leonard, prothonotary, and other clerks, held the contrary of the view above by divers precedents." [*Tindal*, C. J.—Is there any distinction between dies datus, prece partium, and imparlance?] In Moore, 32, the following note occurs of a conversation between Bendloe and Dyer:—"Benlows—Il y ad diversity tenus inter imparlãce et prece partium ou dies dat', car p le dies datus il affirm en luy notice del chose demand., mes nemy per imparlance. Dyer—Avera le tenant le plea a pleader non-tenure apres imparlance? Benlows—Je croy que cy, mes nemy aps prece partium. Dyer—Certes en nul de ceux cases." Bro. Abr. *Continuance*, pl. 24, 43, *Default*, pl. 1, 40, 51, and *Estoppel*, pl. 24, 32, 35, are distinct authorities to shew that the object of the view and its consequences are as above stated. In 2 Wms. Saund. 45 *c*, n., it is said: "The exceptions specified in the statutes of Westminster 2 (13 Ed. 1), c. 48, are held not to be all the cases wherein a view ought to be denied, but they are for example's sake, and the true rule is, that a view, being a dilatory [proceeding], shall not be granted unless where a view is necessary: whenever, therefore, it is plain that the tenant has sufficient knowledge what it is that the demandant sues for, there a view shall not be granted; as, for instance, where a church is demanded,

1837.

TOLSON Dem., WATSON Ten.

called by a particular saint, and lying in such a vill, and the tenant says there are two churches in that vill, and therefore demands a view, the demandant says, by way of counterplea, that there is but one church of that name in the vill; this was holden a good counterplea, and the view was denied by the court. But it is no bar to a view, to counterplead that the tenant is in actual possession of the lands demanded, without adding, 'and of no other lands in the same vill,' &c."

At all events, the tenant should not have demanded a view in the absence of the demandant—at a time when he could not be in court to counterplead—when both parties were absent with the leave of the court. The tenant was not bound to appear, and could not regularly appear, until the 27th of May.

Stephen, Serjeant, and *Peacock*, in support of the rule.—The tenant having properly demanded a view, the petit cape issued irregularly. It is objected that the demand of view was made a day too soon. That, however, is not so. The imparlance is a general imparlance for time to plead within the first four days of Trinity Term. By act of parliament (1 Will. 4, c. 3), Easter term commences on the 22nd May. That day, however, being Sunday, the 23rd became the first day: consequently the 26th was the day on which the demandant and tenant were bound to be in court. Wherever a party has to appear within the first four days of a term, the fourth day is the day on which he is bound to appear; he would be in default if he delayed his appearance until the fifth day.

Supposing the demand of view to have been irregular, the demandant, at all events, should not have sued out a petit cape: he should have demurred. A petit cape can only be sued out where the tenant has committed default. In Booth on Real Actions, 19, it is said: "Default before appearance is, a non-appearance in court at the day of the

1837.

TOLSON Dem., WATSON Ten.

return of the original writ, for which the tenant in a præcipe shall lose his land unless he can save, that is, excuse his default, and to that end, upon such default, a grand cape shall be awarded, to take the land into the king's hands." "Default after appearance differs nothing in the nature of the thing from default before appearance, save only in the circumstance of time, that the one is, the not appearing nor essoigning upon the return of the original, and the other is, not appearing or essoigning upon the return of some mesne process, or some other day given, when he has appeared before to the original. In the first place, the tenant shall lose his land upon the return of the grand cape in all præcipe quod reddats, if he cannot save his default, as is shewed before; in the other case, a petit cape shall be awarded, and, upon the return of that, if the tenant cannot save his default, he shall lose his land in all præcipe quod reddats"—Booth, 64. That the demandant should have counterpleaded or demurred to the demand of view, is clear from many authorities. Thus, in Booth, 37, it is said: "In most real actions, after the demandant hath counted, the tenant may demand the view of the land demanded, or, if it be a rent or other thing, view of the land out of which it issues. Nomo-lexicon, tit. *View*. And the reason and ground of this institution in the law was, quod certa res in judic' possit deduci. But, because the tenant commonly demands the view merely to delay the demandant, and not for want of certain knowledge of the thing demanded, therefore the statute of Westminster 2, c. 48 (13 Edw. 1), was made, to prevent view where it is not necessary, as in the particular cases enumerated in the statute expounded in 2 Inst. And therefore, where any demands the view in such cases named in the statute, the demandant may counterplead the view, i. e. allege matter in pleading which ousts him of view, as, where he that loseth land by default brings a quod ei deforceat for the recovery of it, the tenant shall not have view, because he

1837.

TOLSON Dem., WATSON Ten.

is well enough ascertained of the land by the former record: so, where view was had in a former writ, and that writ was abated after view for some mistake that appeared upon the view, as, non-tenure, misnaming of the town; so, in dower, when it is brought against the same tenant that purchased the land of the husband: so, if the husband died seised, it is a good counterplea of view in dower—34 H. 6, 3: 21 E. 4, 22; and some other cases mentioned in the statute. Vide 2 Inst. 480." In the Year Book, 39 Edw. 3, 38, is a counterplea to view in formedon: "Le view ne deves av., car vous portastes un sci. fa. v. nous de mesmes les tenements. Et pourtant etes vous asserts queux tenements nous demandons. Jugdment s'il doit le view av." The judgment is against the view, and is purq. respondeas. That is a distinct authority to shew that this is a mere matter of pleading, and is not to be disposed of in the summary manner the demandant has here adopted; and that an erroneous demand of view only gives rise to a respondeat ouster. So, in Jenkins, 7 Cent., Case 82, it is said: "If a demurrer is joined upon a plea to the jurisdiction, person, writ, upon view, aid, voucher, essoin, although it be adjourned to another term, and judged against the defendant who pleads such plea, it is only a respondeat ouster." 46 Ed. 3, 4, cited on the other side, is the case of a prece partium, which differs from an imparlance—"Belknap vient al barre, et demand le view; le demandant dit, per Perle, q'il avoit prise jour per parce pretium, et que il est oustre de view." In *Davis* v. *Lees*, Willes, 344, the view was counterpleaded. *Onslow* v. *Smith*, 2 B. & P. 384, is an authority in favour of the tenant; for, aid and view are governed very much by the same principles. That was a writ of right: the tenant, after imparlance, prayed in aid; the demandant demurred: the court was of opinion that the demurrer ought to be allowed, and the judgment is, that the tenant shall answer alone, without the aid of Hugo Meynell, the son. And this was decided

1837.

TOLSON Dem., WATSON Ten.

upon the authority of 3 Hen. 6, 5. b. In Bro. Abr. *Peremptorie*, pl. 76, it is laid down—"Si le tenant preye aide, et le demandant ceo counterpled, le tenant plede estoppel contre le counterplea, que est adjudge conter luy, cest peremptorie, mes sur demurrer sur le aid, view, ou voucher, ceo n'est peremptorie." And in Bro. Abr. *Aide*, pl. 118—"Si aide soit grant ou ceo ne gist, c'nest error mes delay. Et contra, si aide soit deny ou ceo gist, c'est error." If this point be be clear, there can be no necessity for going into the other point, which seems to have been vexata questio so early as the reign of Elizabeth. The balance of authority (if the discussion be thought useful) will be found to preponderate greatly in favour of the tenant—Com. Dig. *Abatement*, (I) 20; Com. Dig. *Pleader*, (3 Y 3); Theobald's Dig. of Writs, &c. (1759), Lib. 14, c. 2, s. 18; Vin. Abr. *View*, (I); Bro. Abr. 803, *View*, pl. 1; Rast. Ent. 376. b.; Co. Ent. 339. c.; 2 Wms. Saund. 45*g*.; Booth on Real Actions, 36, 39, 93, 160; Dyer, 210. b.; Keilway, 93. b.; *Brook* v. *Groves*, Hutton, 28; *Davis* v. *Lees*, Willes, 344. [*Tindal*, C. J., observed that the discussion of this point would not become necessary unless, on consideration, the former was decided against the tenant.]

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.—The question which has been argued before us arises upon a rule obtained by the tenant, calling upon the demandant to shew cause why a writ of petit cape issued by him should not be set aside for irregularity, and why the defendant should not have a view: and the irregularity complained of is, that the writ was issued at a time when the tenant was in court, and had demanded a view. The demandant, on the other hand, contends, that the tenant was in no condition to demand a view; first, because the view is not demandable after a general imparlance; secondly,

1837.

TOLSON Dem., WATSON Ten.

because the view was demanded before the day of appearance given by the imparlance, and consequently at a time when the tenant was not in court.

As to the second ground of objection, upon reference to the dates of the proceedings, it appears to be unfounded: for, the imparlance was granted on the 4th of May, to Trinity Term, which began on the 22nd of May; so that the quarto die post would be the 25th; or, as the first day of the term fell on a Sunday, supposing that day to be left out, the quarto die post must at latest have been the 26th, on which day the view was demanded.

The only objection, therefore, which remains to the regularity of the view, is, that it was demanded after a general imparlance. And we must confess that we should have felt ourselves involved in considerable difficulty if we were called upon, in the instance of probably the last writ of formedon which will be brought before us, to decide a point of practice which seems to have been vexata questio for nearly three hundred years; as it appears by Dyer, fo. 210. b., that, when this very point was moved, the court thought one way and the prothonotaries the other; and certainly the subsequent authorities are rather in favour of the opinion of the latter. We feel ourselves, however, relieved from this difficulty by the objection taken by the tenant, namely, that, admitting that the demand of view cannot be supported, yet the demandant is irregular in suing out the petit cape—a writ which can only be awarded where a default has been committed by the tenant, as is manifest from the authorities in Booth, tit. Default after Appearance; whereas, here, there has been no default. And, upon reference to the authorities cited on the part of the tenant, we are of opinion, that, if the demand of view is objected to upon any ground arising on matter of fact, the demandant should have put in a counterplea, or, if upon any matter of law, he should have demurred; and that the judgment given on a demurrer

1837.

TOLSON Dem., WATSON Ten.

would not have been peremptory, but an award of respondeas ouster only. The authorities to which we refer, are, the Year Book, 39 Ed. 3, fo. 38, 7 Jenkins's Cent. case 82, Brooke's Abridgment, title *Peremptorie*, pl. 76, and title *Aide*, pl. 118.

On the ground, therefore, that the demandant has treated this demand of view as a nullity, and has sued out a writ of petit cape, when he ought to have counterpleaded or demurred, we think his proceeding irregular, and that so much of the rule as calls upon us to set aside the writ of petit cape for irregularity, must be made absolute.

Rule absolute.

END OF EASTER TERM.

IN THE HOUSE OF LORDS.

TRINITY VACATION, 1 VICTORIÆ.

ERROR FROM THE EXCHEQUER CHAMBER.

1837.

Saturday, July 15th.

GARLAND *v.* CARLISLE, Assignee of LEONARD, a Bankrupt.

A sheriff who seizes the effects of a trader under a fi. fa. issued after a secret act of bankruptcy, and afterwards, but before the issuing of a commission, sells or delivers over the goods to the creditor in satisfaction of the debt, is liable for the value in an action of trover at the suit of the assignees appointed under a commission subsequently issued against such trader.

THIS was an action of trover brought by the plaintiff below, assignee of the estate and effects of one T. V. Leonard, a bankrupt, to recover the value of goods that had been seized by the sheriff (the defendant below) under a fi. fa. issued against the goods of Leonard at the suit of one Payne. It appeared from the special verdict (see 4 Moore & Scott, 24) that Leonard, being a trader, committed an act of bankruptcy on the 15th of October, 1824; that, on the 15th December, the fi. fa., tested the last day of Michaelmas Term preceding, and returnable on Monday next after eight days of St. Hilary, was sued out, and on the 16th, delivered to the under-sheriff; that, on the 17th, the officer seized the goods in question, and remained in possession until the 24th, when an arrangement was entered into between the execution-creditor and the bankrupt, with the assent of the officer, by which the former was to take goods in satisfaction of the debt and costs, and other goods were set apart for the purpose of realizing the sheriff's poundage, officer's fees, &c., which

1837.

GARLAND v. CARLISLE.

were afterwards paid; and that a commission issued against Leonard on the 8th January, 1825, under which he was on the 14th duly declared a bankrupt.

Judgment having been given for the plaintiff below in the court of Common Pleas—see 5 M. & P. 102, 7 Bing. 298—the defendant below brought a writ of error in the Exchequer Chamber. The judges on that occasion being equally divided in opinion, the judgment of the court of Common Pleas was affirmed—see 4 M. & Scott, 102, 2 C. & M. 31, 3 Tyr. 705. On appeal to the House of Lords, the following questions were proposed for the opinions of the judges:—

Questions.

"1. Whether a sheriff seizing and selling goods under a fi. fa. was, in December, 1824, liable in an action of trover brought by the assignees of the defendant in the action in which the fi. fa. was issued, such defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after such sale."

If this question be answered in the affirmative, then

"2. Whether such sheriff was liable, if, after seizing the goods, he had permitted them to be disposed of according to an arrangement between the plaintiff and the defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage."

If the first question be answered in the negative, then

"3. Whether such sheriff was liable, if, instead of selling the goods, he had concurred in an arrangement between the plaintiff and the defendant in the action, under which the goods were delivered to the plaintiff in the action in satisfaction of his demand, the sheriff receiving his poundage."

There being still a difference of opinion, the learned judges now delivered their opinions seriatim, to the following effect:—

1837.

GARLAND v. CARLISLE.

First question.

COLTMAN, J.—The first question proposed by your lordships is one which, after the conflict of opinion it has given rise to, cannot but be considered as of no ordinary difficulty. The question refers to the state of the law in 1824, at which time the 5 Geo. 4, c. 98, had passed, but had not come into operation, except for the special purposes referred to in the 133rd section. The decision of the matter in debate must therefore turn upon the previous statutes, especially that of 13 Eliz. c. 7, and on the course of decisions which have taken place in reference to those statutes. The first statute, that of the 34 & 35 Hen. 8, c. 4, authorizes the disposition of the bankrupt's property for satisfaction of his creditors, and gives the same effect to the transfer as if it were a conveyance by the bankrupt himself. There is nothing in this act shewing any intention that its enactments should have a retrospective effect. The 13 Eliz. c. 7, after authorizing the appointment of commissioners for managing and disposing of the bankrupt's estate, directs that every direction, order, bargain, sale, and other thing done by the persons so authorized, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, &c., and against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts had, made, or done after any such persons shall become bankrupt. The object of this statute was undoubtedly to give the commissioners when appointed a retroactive power, so as to enable them to avoid incumbrances and transfers of the bankrupt's property happening subsequent to the act of bankruptcy. To what extent and to what persons this power was intended to operate, is the main subject of the present inquiry. The 9th section of the 21 Jac. 1, c. 19, has not, as it seems to me, any very direct bearing on the present question. The lands of the bankrupt were at that time bound by a judgment from the day to which the judgment related; and when a fi. fa.

1837.

GARLAND v. CARLISLE.

issued, the goods were bound from the teste of the writ of fi. fa. The judgment in many cases was not for a just debt, but for a penalty. The object of the clause was, to provide a remedy for these special inconveniences; but it applies only in terms to creditors, and appears to leave the liability of the sheriff where the former statute had left it. The material words of the statute of Elizabeth are, that every direction, order, &c., by the commissioners, shall be good against the offender or debtor, &c., and against all other persons claiming by, from, or under him, by any act had, made, or done after he shall become bankrupt. It was stated by counsel at your lordships' bar, if I rightly apprehended his argument, that the provision in question did not apply to judgment creditors, and that their case was not provided for till the statute of James. But I am not aware of any authority which bears out the position intended to be implied, viz. that the act of Elizabeth applied only to persons claiming under the bankrupt by some voluntary act or conveyance by him had, made, or done. On the contrary, I conceive that an execution-creditor has always been considered as falling within the fair scope and meaning of the words "claiming by, from, or under." He has no claim or title to the goods whatsoever, except what he derives from his debtor. It is because they belong to the debtor that he lays claim to them; and for that only reason he does not claim by an independent or paramount title, but by one subsequent, subordinate, and dependent entirely upon the goodness of the debtor's title. If any doubt could be entertained on this point, it is to be recollected, that, by the statute 21 Jac. 1, c. 19, s. 1, the provisions of the statute of Elizabeth are to be expounded in all things largely and beneficially for the aid, help, and relief of the creditors. If such is the case with the execution-creditor, what is to be said as to the sheriff? The ground on which his case was sought to be distinguished in argument from that of the execution-creditor was this,

1837.

GARLAND v. CARLISLE.

that he claimed nothing but to execute the king's writ, and could not strictly be said to claim anything. This mode of treating the subject seems to savour a little of verbal refinement, and strikes the mind with an impression as if it were more specious than solid; for, it occurs at once to ask, if the sheriff claim nothing in the goods, why does he intermeddle with them at all. It seems to me that he does claim a right in the goods, namely, a right to seize and sell them; and that right is derived out of the debtor's right to them. He may, then, without any impropriety of language, be considered as falling within the description of a person claiming by, through, or under the debtor, if such appeared to be the intention of the act of parliament. But, if the general object and scope of the act would be satisfied by putting a different construction upon the clause, I do not think it would be doing any great violence to the language of it, if we were to say that the act was intended only to apply to persons who claimed an interest in the goods for their own benefit. The object of the act of parliament is, to promote an equal distribution of the assets amongst all the creditors. To effectuate this object, it is essential that an execution-creditor who has laid hold for his own use of a portion of the fund, should be made to refund it. But the case of the sheriff is different. He does not keep the money in his hands. He is a mere instrument of transfer; and it is by no means necessary, in order to carry out the object of the bankrupt laws, that he should be liable to pay back money which is no longer in his hands. The policy of the bankrupt laws is satisfied by holding that the party to whom he has paid the money over is liable to refund it. It seems to me, therefore, that, although the words of the clause in question are large enough to include the sheriff, and do in their natural sense include him, yet that it may be construed in the more restricted sense, without doing much violence to the terms in which it is expressed. An argument in favor of the

1837.

GARLAND v. CARLISLE.

more restricted construction has been urged at your lordships' bar, which appears to me of considerable weight. It was said, that, if, after an act of bankruptcy committed, a debtor of the bankrupt, having notice of the act of bankruptcy, pays his debt, he will be liable to pay it over again to the assignees, if a commission should afterwards issue; yet, if he is sued before the commission issues, he cannot defend himself on the ground that an act of bankruptcy has been committed, and that a commission *may* issue. *Prickett* v. *Dowse*, 3 Camp. 131, was cited in support of these positions. And *Foster* v. *Allanson*, 2 T.R. 479, is to the same effect. It was said further, that, if the bankrupt should sue for the debt, and recover judgment, and the debt should be thereupon paid by the debtor in satisfaction of the judgment, the assignees under a commission subsequently issued could not claim to be paid over again. The law was certainly so laid down by the judges in the above-mentioned case of *Foster* v. *Allanson*, and has not, as far as I am aware, ever been called in question. Here, then, is a striking exception to the universality of that rule of the bankrupt law by which all the property and rights of the bankrupt are by relation transferred to the assignees, in all their entirety, as they existed at the time of the act of bankruptcy. On what principle does this exception rest? I am not able to find any satisfactory one, other than that which was contended for in argument at the bar, that what the law compels a man to do, that it will if possible justify him in doing. This principle is so entirely consistent with reason and the plainest dictates of justice, that it ought not lightly to be departed from. It cannot, indeed, be contended that it is of force sufficient to control the distinct and positive enactments of a statute; but, where a statute admits of two constructions, it may furnish an argument of considerable weight for the adoption of the one in preference to the other. It is obvious that

1837.

GARLAND v. CARLISLE.

this argument, be its weight more or less, is directly applicable to the case of the sheriff. He is bound to obey the writ: he is liable to attachment if he does not. In the construing of an act of parliament, some degree even of astuteness might be pardoned, in endeavouring to avoid such a scandal to the law as must result, where a man has been compelled to do a certain act, and is afterwards punished for doing it—where he is compelled to pay either in purse or in person for having done an act which he had been compelled by a similar legal necessity to perform. If these considerations had induced the courts of law to adopt what I have called the more restricted construction of the clause in question, I should have thought them well warranted in doing so; and it seems to me that in the early cases the courts leaned to that construction. But I am constrained to say, that, in my judgment, the great body and weight of authority is on the other side. I do not propose to go in detail through the cases. They have already on former occasions been sifted with a degree of learning and care which leaves nothing further to be said on either side the question. Whatever conclusion may be come to with respect to the earlier decisions (which are for the most part but indifferently reported), it is indisputable, that, for many years back, the decisions have been uniform, that the sheriff is liable. The case of *Potter* v. *Starkie*, decided in the Exchequer, in 1807, is of itself an authority of great weight: it was, as I have learned from one of my learned brothers now present (himself of counsel for the plaintiff), elaborately argued on behalf of the sheriff by a most able, acute, and learned person (Sir John Richardson), and before judges perfectly conversant in the law applicable to the question in debate. It is stated, in 4 M. & S. 260, that the decision in *Potter* v. *Starkie* was considered as following from the case of *Cooper* v. *Chitty*. But it is not to be understood from this statement that the difference between the two

1837.

GARLAND v. CARLISLE.

cases escaped the attention of the Bar and the Bench. On the contrary, in the case of *Lazarus* v. *Waithman*, 5 Moore, 19, Richardson, J., when speaking of the case of *Potter* v. *Starkie*, by the name of *Lyon* v. *Lamb*, informs us that the difference between that case and the case of *Cooper* v. *Chitty* was pointed out and insisted on; but that the court held that the property was changed and vested in the assignees, by relation, from the time that the act was committed. This decision must therefore be looked upon as the deliberate judgment of the court of Exchequer expressly upon the point now in debate. That decision appears to have been acted upon by Lord Ellenborough in 1813, in the case of *Wyatt* v. *Blades*, 3 Camp. 396. It was followed in 1821 by the court of Common Pleas in the case of *Lazarus* v. *Waithman;* and again, by the same court, in *Price* v. *Helyar;* and in 1831, by the court of King's Bench in *Dillon* v. *Langley*. Now, if it were admitted, which is open to some dispute, that the early decisions are at variance with the modern ones, the latter are so precise, and have now been considered for so many years as established law, that, even if less capable of being upheld upon the express words of the statute than I think they are, they ought not now to be overturned.

The law is pre-eminently a sensitive and a practical science. Where there is a real grievance, it never fails to shew itself, and usually either works out a remedy for itself, or is remedied by the legislature. However great the anomaly may be (theoretically considered) in holding the sheriff liable in the case under consideration, the practical inconvenience has never been found to be very serious. If the sheriff is called upon to pay over to the assignees money which he has already paid to the execution-creditor, he may recoup himself at the expense of the creditor; or if, before he has paid over the money, he has good reason to apprehend a bankruptcy, he may apply to the party suing out the writ, for an indemnity,

1837.

GARLAND v. CARLISLE.

or to the court for the time to return the writ. How little of real practical grievance there is, may be inferred from the well-known fact, that the office of undersheriff is in general request, and is looked upon as an office of emolument sufficient to countervail any risk it may bring with it. The practical evil, on the other hand, is of no small amount, when the courts of law depart on any but the most solid grounds from an established course of legal precedents. The importance of certainty with respect to the rules of law ought never to be lost sight of. That important object can hardly be attained if the authority of decided cases is to be shaken by a perpetual recurrence to first principles, and upon doubts not bottomed in any great practical mischief.

These considerations have led my mind to the conclusion that the answer to the first question proposed by your lordships ought to be in the affirmative.

Second question.

To the second question proposed by your lordships, I answer also in the affirmative. The goods by the supposition having been seized by the sheriff, and being in his custody and power, they cannot be disposed of by the agreement of the parties, without the permission of the sheriff; the disposing of the goods in this way with the consent of the sheriff, is, as against the assignees, a conversion of the property, as much as if he had sold them by auction.

Third question.

To the third question, no answer is required, the first having been answered in the affirmative.

First question.

ALDERSON, B.—I do not apprehend, after the very full and elaborate discussion which this case has undergone, that I should usefully occupy your lordships' time by commenting at length on the various cases and statutes referred to in the course of this argument. I propose, therefore, to state shortly to your lordships the points which I consider to have been established, and the grounds on which

1837.

GARLAND v. CARLISLE.

my opinion must depend. In the first place, I consider it as made out, that, upon the assignment by the commissioners, all the bankrupt's property vests in the assignees by relation from the act of bankruptcy; and that this, being a relation created by the legislature, is equivalent to a statutable enactment, that, at the time of and by the commission of an act of bankruptcy, that property which before was the property of the bankrupt becomes the property of others, his assignees. I am content for this purpose to refer your lordships to the reasons contained in the judgment of Mr. Baron Parke in this case, which is to be found in 3 Tyr. 746. I entirely concur also with that learned judge in thinking that the sheriff, who undoubtedly claims to take the goods under the execution only because they are the goods of the bankrupt, is a person who claims by or under the bankrupt; and, where the proceedings are subsequent to the act of bankruptcy, that he claims "by or under the bankrupt by an act done after the bankruptcy." For, if we were to confine those words to voluntary acts done by the bankrupt himself, we should in the first place violate their most simple and plain meaning; and, secondly, the more limited construction thus adopted would equally enable the execution-creditor to hold the goods, which would be contrary to the policy of the law; and, thirdly, it would equally exonerate the sheriff if he acted after he had notice of the act of bankruptcy, and even of the commission itself. In addition to these reasons, I may also rely on the authority of Lord Mansfield in *Cooper* v. *Chitty*, where he says: "Dispositions by process of law are put on the same principle with dispositions by the party: to be valid, they must be completed before the act of bankruptcy;" and of Lord Hardwicke in *Billon* v. *Hyde*, 1 Ves. sen. 328, where he says: "By the act of bankruptcy, all the real and personal estate vested in the assignees, and the property vested in them from the time of the act com-

1837.

GARLAND v. CARLISLE.

mitted; and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them. So that a sale of goods by the bankrupt after the act committed, is a sale of their property; for which they may maintain trover. So it is as to the payment of money; and this was the intent of the act of parliament, the statute of Jac. 1, c. 19, s. 14, being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing of it. This relation the assignment has, it does not only overcharge acts done in pais and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments: so that, if execution is taken out after the act committed, upon a judgment before, that execution is undone and set aside. It is said that this rule, founded on this act of parliament, is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one, which is a general rule invented to support the right and equity of the case. But the reason of taking this cause out of that rule is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience, and the legislature foresaw there would be a particular mischief, which they cured by that proviso, but did not extend it further, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts; so, as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." And Lord Mansfield, in *Cooper* v. *Chitty*, expresses himself in these words: "This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the

1837.

GARLAND v. CARLISLE.

bankrupt had at the time of what I may call the crime committed (for the old statutes consider him a criminal); they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy." Now, if this be the result of a due construction of the various statutes applicable to bankrupts, and there be no express exception in those acts of parliament in favour of the sheriff (which I take to be a conceded point), what reason is there why the court should make an implied exception in order to avoid what is supposed to be a great hardship on this public officer? I conceive this is a question for legislative interference, and not for judicial interpretation. If the legislature have enacted, for certain wise and convenient purposes, that this relation shall exist, and have made no express exception, the best course, as it seems to me, is, to carry into effect their enactments simply and without subtle and nice exceptions to be engrafted thereon according to our private notions of expediency and justice. Where is a limit to be drawn? One judge may limit his view of the hardship being such as to introduce an exception in the act of the case of the sheriff alone; another may include the execution-creditor; a third extend it to the case of an intermediate pledge: and, in the end, that great object, clearness and certainty in the law, will be wholly lost sight of and forgotten. If I were at liberty to discuss the question as a legislator, I think many good and valid reasons might be given, why, for the prevention of frauds to be committed through the medium of the sheriff, by creditors secretly indemnifying the officer by whom the levy is made, the law, as I take it to be at present, ought to remain. But I disclaim to discuss the question at all on that ground.

I shall next proceed to refer to the cases which are reported in our books on this subject, because, undoubtedly,

1837.

GARLAND v. CARLISLE.

if I had found this question already settled by a course of decisions, it would have been my duty to acquiesce, even if those decisions did not agree with the view I might take of the legislative provisions on this subject. Now, on examining these authorities, I think they will be found very strongly to support the view I have before taken.

In *Cooper* v. *Chitty*, which took place in the year 1756, there was an act of bankruptcy before the seizure by the sheriff, and after that a commission and assignment, and then subsequently a sale by the sheriff under the writ: the court decided that the action of trover was maintainable, although an action of trespass would not lie. Now, there has been much argument on the point whether this decision really turns on a distinction between the actions of trespass and trover, or on the circumstances that the act of seizure was before, and the sale after the assignment. The judges who have decided the cases in our books, seem to me to have adopted the former as the real ground of that decision. In the earliest case on the subject—that of *Campbell* v. *Hitchin*, which was decided by Lord Chief Justice De Grey, assisted by Blackstone, J., who reported both that case and *Cooper* v. *Chitty*—I find it thus laid down: "Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued. So ruled in *Leckmere* v. *Thorogood*, and in *Cooper* v. *Chitty*. But by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff and his vendee or the plaintiff in the execution." It may be said that this is only an obiter dictum. Even so it is entitled to much weight, as shewing what was considered to be the law in 1772; and this, too, when we find that Mr. Justice Blackstone, who concurred in this decision, represents Lord Mansfield as having expressed himself to the like effect in *Cooper* v. *Chitty*. But that judgment contains another passage to the same

1837.

GARLAND v. CARLISLE.

effect, to which that observation does not properly apply. The facts of that case, which was an action for money had and received, were these:—On the 9th March, 1769, the goods were levied and sold. On the 9th April following, the commission and assignment took place. The act of bankruptcy was in February preceding. There had been previously an action of trover, in which the prior act of bankruptcy had not been proved. The court say: "In the present case, *as there was clearly a conversion before the action of trover*, the only question could be on the property." And this observation was necessary to the judgment. The court, therefore, clearly decide that the sale by the sheriff before the commission and assignment, is a conversion sufficient to maintain trover. From that time till the case of *Potter* v. *Starkie*, decided first by Mr. Baron Wood, and afterwards confirmed by the court of Exchequer, there are no decisions to be found in our books. *Potter* v. *Starkie* was followed by *Lazarus* v. *Waithman*, in which the so much relied on case of *Bailey* v. *Bunning* was cited without effect. There, Burrough, J., says: "This point was settled before I knew Westminster Hall." Richardson, J., says: "The law has been long since settled:" and he adds afterwards: "In the case of *Lyon* v. *Lamb*, the sheriff sold under an execution before he had any intimation that an act of bankruptcy had been committed; and it was insisted that that circumstance distinguished it from *Cooper* v. *Chitty*: but the court of Exchequer held that the property was changed, and vested in the assignees, by relation, from the time that act was committed."

I cite these observations to shew that it can scarcely be proper to say that all these decisions proceed on a mistake as to *Cooper* v. *Chitty*. It is clear to me that they proceed on what the judges think to be the only true ground on which *Cooper* v. *Chitty* can properly stand.

Price v. *Helyar* was the next case; and there the court

adopted the same distinction. *Dillon* v. *Langley* is the last decision to which it is necessary to refer. There, the point was expressly raised. *Bailey* v. *Bunning* and *Cole* v. *Davies* were both cited, and the decision was again, that, under these circumstances, trover was maintainable, though trespass would not lie.

It cannot be disputed, that, upon this subject, the course of decisions was for a very long period uniform in all the courts. *Potter* v. *Starkie* was a decision of the court of Exchequer. *Lazarus* v. *Waithman* and *Price* v. *Helyar*, of the Common Pleas. *Dillon* v. *Langley*, of the King's Bench. These were all decisions in banc. And the same rule has, at all events, been incidentally laid down by Lord Chief Justice De Grey in *Hitchin* v. *Campbell*. A similar decision was made by Lord Ellenborough in one reported case at Nisi Prius; and probably by various other learned judges, in cases in which it was treated as law too clear to be reported: for, we find it so laid down in our text books; and the personal testimony of those who have led during the last half century the principal mercantile cases at Guildhall, is to the same effect. If even all this were erroneous, it is one of the strongest instances of the antient maxim "Communis error facit jus."

This was the state of the authorities when the case of *Balme* v. *Hutton* was brought before the court of Exchequer; and, surely, if any point could be considered as established by an uniform course of decisions subsequent to the case of *Cooper* v. *Chitty*, this was that point. That case, however, was decided otherwise, and, as it is said, on the authority of cases prior to *Cooper* v. *Chitty*. I will shortly advert to these earlier decisions.

The only case of trover against the sheriff, is that of *Bailey* v. *Bunning*. Now, after examining that case with attention, it appears to me not entitled to much weight. The reports of it are clearly in many respects incorrect. The observation on which the main reliance is placed, if

1837.

GARLAND v. CARLISLE.

made at all by the court, is not very applicable to the facts, as they now are clearly ascertained from the special verdict. It is possible that the real point decided there was, that the mere seizure by the sheriff did not amount to a conversion; and that the court thought, that, although, if an ordinary person seized property, and took possession of it, it would be a conversion; yet that, in the case of the sheriff, who, in obedience to the writ, took possession of the property in which the bankrupt had at the time a defeasible interest, such taking would not amount to a conversion. The facts of that case bear no resemblance to that now before your lordships: for, there, the goods remained in the sheriff's hands at the time the action was brought. If we are to pay no attention to the obiter dicta in *Hitchin* v. *Campbell*, why should we give so much weight to an obiter dictum in a case remarkably ill reported.

The other cases are all actions of trespass. One of them—*Lechmere* v. *Thorogood*—is another instance of bad reporting, and was so treated by almost all the judges, in *Giles* v. *Grover*, 2 M. & Scott, 197, 9 Bing. 128, some of them suggesting, that, to get a clear view of it, you must take a piece from one report and a piece from another, and so make up a sort of patch-work report of the whole. Such authorities are not surely entitled to great weight. *Cole* v. *Davies* is a Nisi Prius decision of Lord Holt; and Lord Mansfield's opinion in *Cooper* v. *Chitty* is not favourable to the accuracy of that report. As to the case of *Turner* v. *Felgate*, it really does not appear to me materially to bear on the present question.

Upon the whole, then, I think, that, if this were res integra, I ought to come to the conclusion, on the true construction of the various provisions of the bankrupt laws, that, as the property vests, by relation, from the time of the act of bankruptcy, in the assignees, and that not by a fiction of law, but by a positive enactment of the

1837.

GARLAND v. CARLISLE.

legislature, for wise reasons, this relation ought to be followed out into all its natural consequences. One of these is, that the sale of this property by the sheriff is in truth the sale, not of the bankrupt's property, but of the property of J. S., a stranger, and so a conversion of the property of J. S., for which he can maintain trover. This view of the case seems to me to be supported by a long and (with the exception only of *Balme* v. *Hutton*, which has been reversed upon error brought) by an uniform course of decisions. I think, if the opinion I entertain as to the construction of the statutes were doubtful, I should be bound by this current of authority; and therefore I have no hesitation, when I find both authority and the true construction of the statutes concur, in answering the first question put by your lordships in the affirmative.

Second question.

As to the second question, I apprehend there is no doubt or diversity of opinion. I shall therefore content myself with saying that I am of opinion it should be answered in the affirmative also.

Third question.

The third question, in the view I take of the first, it is not necessary for me to answer at all. But my opinion as to that is, that the sheriff is liable—because he has not obeyed the writ, by selling the goods in the ordinary and usual way.

First question

COLERIDGE, J.—In obedience to your lordships' commands, I have considered the questions proposed to the judges in this case; and I have now to state the opinion which I have formed. It can hardly be necessary for me, in so doing, to state that I have formed it and express it with real diffidence in my own judgment, when your lordships are aware of the difference of opinion which exists upon the subject among the highest legal authorities. I may add, however, that I have not only formed it with diffidence, but retain it not without some hesitation, on account of the extreme difficulty I have at times found in

1837.

GARLAND v. CARLISLE.

reconciling all the legal principles which appear to me applicable to it. Upon the best judgment which I have been able to form, I think your lordships' first question should be answered in the affirmative. I believe that I shall be able to state my reasons for so thinking at no great length; for, I do not propose to review the authorities upon the subject. That has been already so fully and ably done at the bar, and in elaborate judgments, which are in your lordships' hands, that I feel I should be taxing your lordships' attention, without the reasonable expectation of throwing any additional light upon that branch of the argument. Speaking in this House, it seems to me enough to say that the result of my examination of the cases is this: I do not find a balance of authority so preponderating as to be absolutely conclusive on my judgment either way. Putting, however, the authorities which are in accordance with my own opinion, at the very lowest possible estimate, and speaking of them in a way in which even those who differ from them cannot but concur, they are numerous, of great weight, entitled to high respect, and have been (which is most important) acquiesced in generally by the legal profession, and acted on for many years. If, therefore, I determine my own opinion independently of them, and upon principle alone, still they warrant me in the satisfactory feeling that I am not setting up that fallible opinion so formed against all the authority bearing on the case. And I profess to pray in aid these decisions no further, as authority, though I shall use without scruple many of the arguments I find stated in them.

Considering this question as one that is to be answered upon principle, I ask myself what are the principles to which I am to apply for an answer; and that raises the further point as to what is the nature of the question itself. If it be a question of common law, in the absence of direct authority, I must look to legal analogy: and

considerations of moral right and wrong, of general expepedience or inconvenience, may be properly allowed to enter largely into the argument. Although the process be in form for the discovery of the law, yet, in the case supposed it is perhaps the province of the judge, substantially, rather to make it. If it be, however, a question of statute law, the inquiry becomes one of a much more restricted range: it is then, in truth, simply a question of construction, and none of those general considerations to which I have alluded have any place, except so far as they serve to illustrate the meaning of the language which the legislature has chosen to employ. And it is obvious, upon this principle, that, where the legal, ordinary, and grammatical sense of the language is unambiguous, these considerations are wholly irrelevant—they cannot alter that sense, which must prevail: we must take the law as we find it; and, if it be unjust or inconvenient, we must leave it to the constitutional authority to amend it. Now, this I think is purely a question of statute law: it depends on the construction of a single section of a single statute—the 2nd section of the 13 Eliz. c. 7; for, the 21 Jac. 1, in my opinion, does not apply; and there seem to me but two points for consideration—first, is the sheriff within the words of the statute, according to their ordinary and grammatical sense?—secondly, if so, is there any rule of law resulting from his character as an officer of the court, or from any other circumstance, which exempts him from its operation?

By the 2nd section of the statute above mentioned, the commissioners are impowered to take by their discretions order with the bankrupt's goods and chattels, to make sale of them, and otherwise order them for the satisfaction and payment of the creditors: and every such order, sale, and other things done by them shall be good and effectual in the law to all intents, constructions, and purposes, against the bankrupt, his wife, heir, children, "and against

1837.

GARLAND v. CARLISLE.

all other person or persons claiming by, from, or under the bankrupt, by any act or acts had, made, or done after he has become bankrupt." It is said that the sheriff is not within these general words, for two reasons—first, that he does not claim by, from, or under the bankrupt—secondly, that, even if he does, it is not a consequence of any act done by the bankrupt.

With regard to the first, the argument at the Bar relied on both points of the proposition as being inapplicable to the sheriff: it was said he was no claimant at all; he claimed nothing; and, if he did, he claimed nothing under the bankrupt, but all under the writ. This argument, I confess, seems to me rather fanciful than sound. When the sheriff is either insisting upon his right to take or to hold the goods or the proceeds, or justifying the act he has done in the seizure of them, I do not know any general term more appropriate to describe his situation than that which the statute uses; and if the right to take or to hold depends, as no doubt it does, on the title of the bankrupt, surely he claims under him, although not by descent, conveyance, or any mode of voluntary transmission. If the execution-creditor, who sets the sheriff in motion, claims under the bankrupt, if the sheriff's vendee of the goods claims under the bankrupt—and it is not disputed that both do—can their case as to this be put upon any principle which will not include that of the sheriff? Is it not that you destroy their respective titles, if you shew that the goods were not the bankrupt's when seized?

But, secondly, it is said, that, at all events, the claim does not arise by virtue of any act done by the bankrupt. It is obvious to answer that the statute says nothing of the act being done by the bankrupt; the words are—"any act or acts had, made, or done after any such person shall become bankrupt." Nor can I think that those words ought to be imported into the statute; if they were, the objection now relied on would apply not merely to the she-

riff but to the execution-creditor, who yet is admitted to be within the clause. He does not claim necessarily under any act done by the bankrupt, any more than the sheriff. If these words—"by the bankrupt"—are not to be imported into the statute, the difficulty does not arise; for, the issuing of the writ, the delivery to the sheriff, the seizure by him, are all acts done subsequently to the bankruptcy, This section of the act of parliament has created the doctrine of election as applicable to this subject-matter, and it in effect vests the property in the bankrupt's goods in the assignees (who now, by subsequent statutes, stand in the place of the commissioners) from the date of the act of bankruptcy. The words are quite general: in order to effectuate their purpose, they have been always held to over-ride every transaction with regard to the property from that date; into whose hands soever the goods may come, and through whosesoever they may pass, the property at every instant is in the assignees, so soon as their general title as such is complete. If, at the moment of that event happening, the goods should be in the sheriff's hands, there is no doubt but that they might recover them from him: and if, after notice of the assignment, he were to sell, no one disputes his liability to answer to the assignees for such sale. It follows, therefore, that the sheriff is within the general words of the statute, although not mentioned expressly—a circumstance, this last, which somewhat diminishes the weight of an observation made at the Bar, that he is not expressly named in any of the statutes which have subsequently restrained the period of relation to the act of bankruptcy within certain limits of time.

If, then, the sheriff falls within the general words of the of the statute, upon what ground are we to exempt him from this operation? I admit that a case of great hardship is made out for him; and, if we were at liberty to enter into that consideration, I confess, that, in the various

1837.

GARLAND v. CARLISLE.

arguments and judgments which I have heard and read on this point, no satisfactory answer has, in my opinion, been given. I cannot admit it to be such, that, upon the whole, the sheriff's poundage makes his office profitable and desirable, or that he is liable in trover only, or in assumpsit, in which the value of the goods is sought to be recovered, and not in trespass. But no lawyer maintains in terms that the argument of hardship can be relied on, where the meaning of the statute is unambiguous. Those, therefore, who contend that the sheriff is not responsible, shape the argument differently: they rely on the ministerial character of the sheriff—that he acts only in strict obedience to the orders of the court, whose officer he is, and whose judgment he executes and is bound to execute: reason and justice, and well-recognized legal principles, they say, require, that, in so doing, he should be borne harmless; that the relation to the act of bankruptcy is but a fiction of law, and must not be allowed to work wrong; and therefore, that, however general the words of the statute are, they must be read with an implied exception as to him.

I state the argument very shortly, not from any wish to diminish its real strength, but because your lordships are fully aware of all the particulars, which are involved in the simple proposition that all that the sheriff does he does in the strict performance of his duty, and under orders. Still, as it seems to me, the substance of the case is merely hardship and unreasonableness, and that the only grounds of law advanced cannot be safely relied on.

First—is this doctrine of relation a mere fiction of law? The statute law in substance enacts that a trader owing a debt or debts of a certain amount, and committing an act of bankruptcy, holds thenceforward his goods by a defeasible title: and that, if a certain other event happens, his title shall be defeated from the date of such act of bankruptcy, and this as regards, not merely himself, but

every one claiming intermediately under him. In what sense is there any fiction here? No fact is supposed to exist contrary to the truth: the assignees have no possession supposed to be in them at a time when it was actually in the bankrupt; but the law, making his title defeasible from a certain moment, avoids in favour of the assignees the title of all those who claim under him by any intermediate acts. The case of the disseisor and disseisee put by the Chief Justice in *Leford's* case, 11 Rep. 51, is an illustration in point: by the disseisin the disseisor acquires the freehold against all the world, and among them the disseissee, so long as the disseisin continues; but, if the disseisee re-enters, *as against the wrong-doer or his servants,* the law supposes the freehold to have always remained in him, and he may maintain trespass for the fruits taken while he was disseised. Now, this supposses a possession contrary to the fact; and the law will not allow that to prevail against any one coming in by title bonâ fide under the disseisor, but gives the whole remedy against him. Here is a fiction of law, and therefore moulded by law to meet the ends of justice: but, if the act of the legislature, upon which this part of the common law must in legal contemplation be supposed to rest, were now in the statute book, in order to effect its purpose, its language must be very different from that of the statute now in discussion: instead of simply saying that the disseisee's title shall prevail, it must have enacted, what would, on the face of it, have appeared to be a fiction, namely, that, as against the disseisor, the disseisee after re-entry shall *be deemed* to have been seised and in possession at a time when he was notoriously not so.

I conceive, therefore, that this is not in fact any fiction of law; but, if it be, it is one enacted by the express words of the act of parliament, and therefore we cannot mould it as we might a fiction of the common law. I may here revert to the case I have just put, and suppose the

1837.

GARLAND v. CARLISLE.

legislature to have enacted, that, *as against all persons*, the disseisee, after re-entry, should be deemed to have been in possession: in that case, could any sense of hardship or injustice warrant the expounders of the law from holding that he might not maintain trespass for the mesne profits against the disseisor's vendee?

But, lastly, can we read the statute with an implied exception in it in favor of the sheriff? I am aware of the lengths to which our predecessors in former times have thought themselves justified in going, when dealing with the concise language and general terms of antient acts of parliament. I will not stop to inquire whether in all the instances that might be cited their course was to be justified, or, in precisely similar circumstances, their example to be followed; but, for one, I think the principle which limits my duty in regard of statutes of so late a date as those of Elizabeth to that of exposition so clear and paramount, that I shall never think myself justified in taking a case out of the operation of a statute which falls within its plain and unambiguous language. I beg to draw attention to the precise words in which I lay down this rule for my own guidance: it is one thing to imply as written in a statute all that is absolutely necessary to give the written words a sensible operation: it is another to exclude any case which the words in their ordinary legal and grammatical sense embrace. And this I may say in addition—that, upon those who call upon us so to do lies the onus of shewing that to include the case will defeat the intention of the legislature, or, at all events, is not necessary to effect it. The former it is not pretended has been done here: and, in my opinion, the latter has not been made out; on the contrary, I see many reasons for thinking, that, to prevent the various frauds which the doctrine of relation was intended to meet, it is wise to include the sheriff within its operation.

For these reasons, I fear imperfectly expressed, and less

strong in themselves perhaps than may suggest themselves to other minds, but which I humbly submit to your lordships, I beg to answer your lordships' first question affirmatively.

First question.

WILLIAMS, J.—In considering the answer to be given to the first, and by far the most material question proposed by your lordships for our consideration, I at first doubted whether, after the many discussions which have taken place, and the opinions already given, it might not have been sufficient to assume the authorities on each side to be equal; and to proceed at once to examine the subject as if it had been res integra. I have been induced, however, upon further reflection, not to adopt that course—not from a vain expectation of making any important addition to what has been already delivered; but partly because I have hitherto had no opportunity of giving any opinion upon the subject at all: chiefly, however, because the supposition above made would, as I think, place the question in a most unfavourable position for the defendant in error. I am quite aware that the decisions of the courts below are not binding upon the authority of your lordships; but I do also presume that opinions here delivered are valuable in proportion as they embody in them and are founded upon those decisions. And, in this view of the case—notwithstanding the doubts which have been suggested, for which, considering the quarter whence they originated, I entertain a long-continued and most sincere respect—I must think that this question has been, theoretically and practically, for upwards of twenty years, without pretending to go further back (I speak of the period from 1807 till 1829), as fixed and settled as almost any ever was or can be without the final sanction of this House. I must refer to the cases more particularly, and (for the reason first mentioned) as shortly as possible hereafter: but, in confirmation of my assertion, I have to state

1837.

GARLAND v. CARLISLE.

that this question has been solemnly decided in the court of Exchequer once, in the Common Pleas twice, and in the King's Bench once: with this, that, in the latter court, upon the occasion alluded to, the point was declared to be so fully ascertained and finally settled that argument was become superfluous—and argument *was not heard*. To this is to be added what Sir John Richardson (with, I believe, many others) observed in the case of *Lazarus* v. *Waithman*, 5 Moore, 19, "that the law on this question has long been settled, and has frequently occurred of late years at Nisi Prius;" which observation would, if it needed it, receive confirmation from the experience of every one who was at all engaged in the practice to which the learned judge was alluding.

Having adverted generally to the decisions, it may not perhaps be out of order to proceed at once to an examination of them. The first in order is the case of *Potter* v. *Starkie*, of which there was no printed report at the time, but of which some notice is to be found in 4 M. & Sel. 260, and also in Mr. Selwyn's Treatise on the Law of Nisi Prius, 8th edit. p. 1431. It has, however, frequently been alluded to, and generally for the purpose of receiving a ready and easy refutation, viz. that it purported to proceed on the authority of *Cooper* v. *Chitty*, 1 Bur. 20, whereas that authority, properly understood, is directly opposed to it. If the case of *Cooper* v. *Chitty* be founded on two principles—first, that the property, upon assignment, vests in the assignees from the date of the act of bankruptcy—and secondly (as Lord Mansfield expressly puts it in one part of his judgment), that the taking was not lawful, because the goods were *then* the goods of a third person, and so there was a conversion, then is the case of *Potter* v. *Starkie* in strict accordance with *Cooper* v. *Chitty*. If, however, the latter case (never denied to be law) can only be sustained by the sheriff having had notice of the bankruptcy when he sold, then the court of Exchequer, though

they agreed with the *decision* in *Cooper* v. *Chitty*, were opposed to that part of the *reasons* for the judgment; and, in my humble opinion, rightly. Seeing, however, that the decision in *Potter* v. *Starkie* is of some importance, having been upon a state of facts which completely coincides with the present, I am desirous to furnish your lordships with the best information that can be obtained, in the absence of a contemporary printed report. I happened to be counsel in the cause, and have a note, taken at the time; and, what is much more material, I have a note of my friend Sir John Richardson's, who was opposed to me on that occasion. With your lordships' permission I will read them; and, when I state what was urged by the counsel, it is merely that your lordships may perceive (so far as that can effect it) how the question was presented to the court.

[The learned judge here read the notes above alluded to, and then proceeded as follows: (*a*)—]

From this statement it will appear that all the acts of the sheriff were completed before he had any notice of the bankruptcy, and before the commission was sued out. It further appears that the exemption of the sheriff *before notice*, was distinctly brought before the court, upon the plea that he acted only in pursuance of his duty: and, on the other side, the immateriality of notice was pressed; and it was even urged that the observations of Lord Mansfield were entitled to less weight on this particular point, because there was no statement in the case of any notice to the sheriff *in fact*, but that the decision may well be sustained upon the other reasoning to be found in that judgment. It has been observed that those cases, which are supposed to be the foundation of the argument of the

(*a*) The Reporter has been favored by Mr. Justice Williams with a copy of his lordship's note of the case of *Potter* v. *Starkie*, which will be found at the end of this case.

1837.

GARLAND v. CARLISLE.

plaintiff in error, were not brought under the notice of the court of Exchequer by Sir John Richardson, who was not in the habit of doing things imperfectly. But the protection of the sheriff under the writ was expressly urged by him, and all the cases alluded to were cited and commented upon by Lord Mansfield in *Cooper* v. *Chitty*, which was itself made the subject of most minute and laborious inquiry and comment in the court of Exchequer: so that it seems to me impossible that they could have utterly neglected the alleged authorities upon which one principal position contended for before them was made to rest: and the more so, if (as *I believe*) time was taken to consider the decision. The cases to which I have been alluding are, of course, *Bailey* v. *Bunning*, *Lechmere* v. *Thorogood*, and *Cole* v. *Davies*; upon which the judgment of the court of Exchequer in the case of *Balme* v. *Hutton* is made so much to rest. But, if the decision of *Potter* v. *Starkie* depended mainly upon the distinction therein taken between trespass and trover, according to the report of Sir John Richardson, which, from his general accuracy, as well as the course which the discussion took, I have no doubt whatever is correct; how can it be supposed that the second of the three cases alluded to, which turned expressly upon the form of action (trespass), had been utterly overlooked by the judges? Upon the whole, if the decision had been one at Nisi Prius only, by Mr. Baron Wood, I should have thought it entitled to much consideration, when I bear in mind that few judges of any time can be named better stored with legal information generally, and absolutely none who understood better the forms of actions, and their respective limits and boundaries. But, when to this is added that the very point recently (and recently only) so much in agitation was brought immediately and directly under the consideration of the court, I confess I must consider it not merely as a decision expressly in point, but moreover entitled to very great weight and authority.

1837.

GARLAND v. CARLISLE.

The next case in order of time was that of *Wyatt* v. *Blades*, in 1813, before Lord Ellenborough, in which the same point was ruled, and where trover was held to be maintainable against the sheriff. It has been remarked, upon this case, that the character of the sheriff, and his liability in that form of action, were unnoticed; and it is for that reason (although it is a Nisi Prius decision) I mention it. It appears from the report in 3 Camp. 396, that this observation is well founded; and I believe it to have been unnoticed simply because matters of constant occurrence and continued acquiescence pass without notice or observation, or, in the words of Mr. Justice Richardson, already referred to—"because the law had long been settled, and the case had frequently occurred at Nisi Prius of late years." A report, at this time of day, would have somewhat of a whimsical appearance, if the object of it was to shew that "money had and received" is the appropriate remedy where a person holds the money of another which he is bound by law to pay over. The next was the case of *Lazaras* v. *Waithman*, Easter Term, 1821: the point was decided by the Common Pleas as it had been in the Exchequer. *Price* v. *Helyar* followed, in 1828, with the same result: it is another decision upon the point in question. Lastly came the case of *Dillon* v. *Langley*, Easter Term, 1831. The report (2 B. & Ad. 131) by no means gives an adequate account of the state of fixedness and settlement at which, in the opinion of the King's Bench, the point now under consideration had arrived. I happened to be counsel in the cause, and am not likely very soon to forget what happened; particularly when I learned so soon after what had occurred in the court of Exchequer, in the very Michaelmas Term following, as to the case of *Balme* v. *Hutton*. I am far from saying that I was prepared with an argument as ingenious as that contained in the elaborate judgment pronounced by Lord

1837.

GARLAND v. CARLISLE.

Lyndhurst in the court of Exchequer; but this I must say, that I was prepared with all the authorities upon which reliance is therein placed. Lord Tenterden, however, having first stopped the counsel on the other side, plainly intimated to me that the season for discussion was past; and, accordingly, having barely noticed two of the authorities alluded to, and particularly the main stay of the plaintiff in error—*Bailey* v. *Bunning*—which then produced no effect in that quarter of Westminster Hall, though it produced so much in another within half a year, against me, I sat down unheard. "These decisions," as Mr. Justice Taunton observed (and I quote his words in consequence of the comment upon them), "will be found to embrace a very considerable period of time, and to have been established in succession by all the common law courts in Westminster Hall; and the common practice, I believe, has been in uniform accordance therewith." And, speaking of the case now before your lordships, and of the same decisions, he added: "I dread the consequences of a decision of this court in favour of the plaintiff in error. Certainty is of the first importance in judicial proceedings; and the decisions during a period of sixty years ought not to be disturbed by fanciful innovations on the one hand, or the authority of some doubtful, if not obsolete, decisions on the other." I am aware that this statement has been represented as an exaggeration: if, however, the case of *Cooper* v. *Chitty* may be maintained, independent of what is said by Lord Mansfield about notice, that period, or even a longer one, will be found more appropriate and accurate than the more limited one mentioned by me at the outset.

I purposely forbear adding to the list of decisions either the case now before your lordships or that of *Balme* v. *Hutton*, although the judgment of the Exchequer was reversed by a majority of seven judges against one. I do

1837.

GARLAND v. CARLISLE.

so because the doubt which has given rise to them both was first started, I believe, in the case of *Hartley* v. *Hornby*, tried at Lancaster, at the Spring Aseizes in 1829. That was an action for money had and received against the sheriff who had levied after an act of bankruptcy, but had sold the goods and paid over the proceeds before the commission issued. The question came before the court of King's Bench upon a motion to enter a nonsuit; and upon the discussion then ensuing the doubt arose to which I have alluded, and a difference of opinion; from which cause, as I presume, the case is not reported. I have, however, procured my brief from the agent of the attorney who instructed me, and there find a very full note of the argument. I shall not trouble your lordships with any part of it, further than to mention that the learned counsel for the defendant cited and expressly admitted the authority of the before-mentioned cases, establishing the liability of the sheriff in trover, and founded their argument entirely upon the fact that the money had been paid over before notice of the bankruptcy, and that therefore that form of action could not be maintained.—So settled up to this time was the question now proposed by your lordships for our consideration!

I come now to the authorities that are opposed, or supposed to be, to the long train of modern cases expressly and deliberately decided upon the point; the authorities, I mean, already referred to, on which the judgment of the court of Exchequer mainly rested in the case of *Balme* v. *Hutton*, and to which, with some emphasis and appearance of assumed superiority, the title of the *older* authorities has been studiously applied. I am not aware that a case is of necessity better for being old; nor, I admit, is it worse; but I make the admission with a material proviso, vis., that it has not been impugned by subsequent decisions; for, if so, it is. Else, what is meant by expressions (in courts of law not unknown) of decisions over-ruled, and

1837.

GARLAND v. CARLISLE.

cases no longer law, which compose a list which it would be most inconvenient to enumerate?

The first of these old authorities is the case *Bailey* v. *Bunning*, 1 Lev. 191 (reported also in Siderfin and Keble), and, I may add, the only case which purports to be in point which has been decided by any court. To what authority this case is entitled, from the state of the reports of it, how far it is impugned by the quære in Siderfin, or its own intrinsic defects, I will not waste your lordships' time by inquiring. I can make no addition to the comments which have been made by my learned brothers with whose opinions upon the main question I agree. I will therefore only say, that, if (and upon this point I shall endeavour to explain myself more fully hereafter) the fact of notice to the sheriff be not material, and moreover, if (as I think) the case of *Cooper* v. *Chitty* may still be maintained as law, then, in my humble judgment, was this old case over-ruled very nearly three quarters of a century ago, and remained dormant until revived (your lordships are to determine for what duration) by a decision of the court of Exchequer in 1831.

The second case—*Lechmere* v. *Thorogood*, 2 Mod. 236—is not in point. It only decides that trespass will not lie in such case; which leaves uncontroverted the question whether trover will lie or not, the distinction between them being not quite so nominal and unreal as might be at first supposed—the damages in the latter being limited by the value of the goods seized (*a*); in the former they may be what Ashhurst, J., (in a case to which I must refer) calls "vindictive." The expression must be regretted; because "vindictive damages," in the ordinary sense of the term, cannot be heard of in courts of law; but, if it be understood to mean general damages upon the whole case,

(*a*) But see Moon v. Raphael, 2 Scott, 489, 2 New Cases, 310.

1837.

GARLAND v. CARLISLE.

without any certain limit, the meaning may be adopted and that is sufficient for my purpose.

The third case is, *Cole* v. *Davies*, 1 Lord Raym. 724. Your lordships are aware of the comments which have been made by Lord Mansfield upon the authority of this report. Into that discussion I decline to enter. Whether Lord Raymond was, at that time, as knowing as age ought to be, or as uninformed as youth sometimes is, I am wholly ignorant: but this I know, that it is a Nisi Prius decision only; and (in imitation of the criticisms upon the modern decisions, as they have been called,) I must add, without the slightest information of how the question was submitted to the learned judge—whether with argument, or how much, or how little, or without any at all—of this we have nothing. I now ask, with all respect, are these cases to be opposed to the dense body of authority arrayed on the other side?

I pass on, however, to an important part of the present discussion: I mean, the true import and bearing of the case of *Cooper* v. *Chitty*. That Lord Mansfield did not conduct his argument throughout that judgment without some variableness and shades of turning, I think must be admitted: from which cause it follows that the case is seized on as an authority both for the plaintiff and the defendant in error. I am extremely anxious to bring to a test before your lordships the question to which side the weight of its authority ought to incline. And upon this point I shall first inquire whether there be any ground *in fact* for those observations which Lord Mansfield has made respecting notice to the sheriff, as the foundation of the conversion: and next, whether, if there be no ground for those observations, the case may still be sustained.

That Lord Mansfield does say, at the conclusion of his judgment, "that the sheriff knew of the bankruptcy before the sale," and derives an inference therefrom, is most certain. But that there is no *fact* in the case to justify

1837.

GARLAND v. CARLISLE.

that assertion, is certain also; except, indeed, the commission sued out and assignment thereon be notice in point of law. But, how is such commission notice, and from what time? The day it issues, or within a week, or at what time? I am aware of no authority which establishes that a commission is evidence of itself, and for itself, of the time at which it issues. This, at least, I know, that, in the case of *Lee* v. *Lopez*, 15 East, 230, where notice to the sheriff was considered material, the point to be ascertained, according to the language of the court, was, not when the commission issued, as if importing notice of itself, but when the sheriff *had notice* of the commission. If, then, the fact of the commission having issued was to be brought home to the sheriff, like any other fact, upon the statement of the case *it is not*. If, then, there be no facts in the case to sustain the observations, what is the result? Why, that, in my opinion, the judgment may be sustained for *other* reasons which Lord Mansfield has given. In the report of the case in Blackstone, Lord Mansfield is made to say, "that, if the sheriff had sold *immediately* after the seizure, he would have been liable." If he did say so, I think he would have said truly; but I find that it is generally considered to be an error in that report. But, how stands the report of the same case in Burrow? The concluding words of Lord Mansfield in his judgment in the case of *Cooper* v. *Chitty*, have been quoted, and with great reliance:—"The seizure here is after the act of bankruptcy, and therefore after the property was vested in the assignees; but that was excusable, and the sheriff shall not be made liable by relation, as a wrong-doer. The gist of this action is, the false return and sale long after the commission and assignment." Passing by the diminished weight of these remarks, from the doubt suggested whether there be any fact to sustain them, let us see what else has been said in an earlier part of his judgment in the same report. I find these words: "But the argument from

these principles (cases are stated to have been commented upon, but the comments are not given) is this: Here, the the taking was *lawful*, and therefore the sheriff was bound to complete the execution by the sale. Answer: The premises are not true; and, if they were, the consequence would not follow." And then come these words, which, I must think, are hardly less material in a contrary direction. The taking was not lawful, because then they were the goods of a *third* person." So, then, the taking was unlawful: and, why? Because it was the taking of goods of a third person—that is, of a person not named in the writ. And, why is that unlawful? Because it is, when followed up by a sale, an unauthorized disposal of the goods of another—which is another name for a conversion. But, beyond all this; for what purpose is notice necessary, and in what respect material? Is the property more or less in the assignees, according as there has or has not been notice to the sheriff of all or any of the stages of the bankruptcy? Is it more or less the taking of *their* goods? And, accordingly, the learned and experienced counsel who argued this case at your lordships' bar expressly rejected the fact of notice as wholly immaterial, and discussed the case as if the plaintiff in error had been fully affected by it.

If, then, the observations at the conclusion of Lord Mansfield's judgment, upon which so much reliance has been placed, may be rejected, and the case be sustained without them, then must the case of *Cooper* v. *Chitty* be added to the authorities in favour of the defendant in error. But, if the fact of notice may be considered as existing in that case from a commission having been sued out, and moreover, that, in order to constitute conversion in the sheriff, notice to him is necessary, though its materiality is now abandoned, still I agree with those of my learned brothers who are of opinion that the case I am observing upon must be considered to be in favour of the defendant in error. The late Mr. Justice Taunton (and with him

1837.

GARLAND v. CARLISLE.

several of the judges have coincided) thus expressed himself in *Balme* v. *Hutton*: "I am pretty clear that an opinion grew up that the sheriff was equally answerable in both cases (i. e. with or without notice); that, from the act of bankruptcy, the property vests in the assignees; and that any sale or disposition of it afterwards without their privity must be a wrongful conversion, by whomsoever made." I will only add that this is precisely the view presented to the court of Exchequer on behalf of the plaintiff, in the case of *Potter* v. *Starkie*. On the case of *Timbrell* v. *Mills*, 1 W. Blac. 205, I shall trouble your lordships with no remark.

The case of *Smith* v. *Miles*, 1 T. R. 475, proceeds entirely upon the distinction taken between trespass and trover, and reference is made in the considered judgment there pronounced to the cases of *Lockmere* v. *Thorogood* *Bailey* v. *Bunning*, and particularly to that part of Lord Mansfield's judgment in *Cooper* v. *Chitty* wherein he speaks of men being excused from being punishable by indictment or action as trespassers. Mr. Justice Ashhurst then adds: "The plaintiffs are not injured, as it is competent to them to recover the value of the goods by bringing the proper action of trover; but the officer shall not be harrassed by this species of action, in which the jury *might* give vindictive damages." It must be admitted, however, that, if notice be material, this case is not any authority for the present, inasmuch as the fact of notice did exist in it.

Suppose, however, that all authorities are rejected, as if they were equal, or as if there had been no decision at all, the question then must have turned upon the construction of the statutes, and chiefly of the 13 Eliz. c. 7, s. 2, whereby the Lord Chancellor is impowered to grant a commission, and the commissioners are to take by their discretion such order and direction as well with the body of the offender as also with his lands, &c., and with his money, goods, chattels, &c., and by deed indented and

1837.

GARLAND v. CARLISLE.

inrolled in one of the Queen's courts of record, to make sale of the lands of the bankrupt, and also of all fees, &c., goods and chattels, or otherwise to order the same for the true satisfaction and payment of the creditors rate and rate alike, according to the quantity of their debts; and it is further enacted "that every direction, order, bargain, sale, &c., shall be good and effectual in the law to all intents and purposes against the said offender or debtor &c., and against all other persons claiming by, from, or under such offender, by any act or acts had, made, or done after any such person shall become bankrupt as is aforesaid." And by the 21 Jac. 1, c. 19, s. 1, it is enacted that "all and singular the aforesaid statutes and laws theretofore made against bankrupts, and for relief of creditors, shall be largely and beneficially construed and expounded for the aid and relief of the creditors of such person or persons as already be or hereafter shall become bankrupts."

These provisions are certainly of a sweeping nature, and are obviously intended so to be. They avoid all acts done after the bankruptcy, and they vest all the property in the assignees (since the statute 6 Anne, c. 22) by relation. "This relation (says Lord Mansfield) the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the *crime* committed (for, the old statutes consider him as a criminal), and make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against *all executions* not served and executed before the act of bankruptcy. Dispositions by process of law are put on the same foot with dispositions by the party." The prevailing object was, to prevent and avoid those partial and therefore unjust dispositions of the remnant of their fortunes which men in desperate circumstances (as we learn from the statutes) had been in the habit of making, and which we know men in such a situation are likely to

1837.

GARLAND v. CARLISLE.

make. Hence the relation to which I am alluding. The case of *Cary* v. *Crisp*, 1 Salk. 118, cited at the bar for the purpose of shewing, that, till assignment, the property remains in the bankrupt, may well be admitted; for, it is in no respect inconsistent. The question is, whose the property is *after* the assignment, and from what date; and upon that question, as no doubt exists, so none was attempted to be raised. The point was admitted. Consequently, as to the first requisite for maintaining the action of trover, I mean property in the goods, the case of the defendant in error is abundantly established.

Next, as to the second requisite for supporting this action—a conversion. Suppose it had been the case of a stranger—an indifferent person—the point, I apprehend, would have been clear: and why? Because it would have been an unauthorised intermeddling with, or (in the language of the court in the case of *Jenkins* v. *Smith*, 1 Wils. 328, when defining a conversion,) "the taking upon him to dispose of the property of another," which is there declared to be "the tortious act, the gist of this action." The question therefore comes to this—whether the case of the sheriff be excepted from, or, rather, not included in, the operation of the statutes, or, if not, whether he be protected by the peculiarity of his situation and character? That he is not expresely excepted, is clear, and has nowhere been pretended. To hold that he is so, virtually or constructively, is more than I am prepared to do. And herein I beg leave to say that I do most perfectly agree with the observations of more than one of my learned brothers as to our duty in construing and interpreting acts of parliament. I take it to be this:—Where the words of the act are general and comprehensive, and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice which must inevitably ensue from such a construction, can authorize courts of law in giving a more confined and limited meaning to such general expressions than they or-

dinarily and naturally import and bear. What else is restraining by inference or varying by interpretation, but, to a certain extent, recasting and remodelling the statute, or, in other words, invading the province of the legislature itself? What right have we to assume, that, if the object in this case was (as it was undoubtedly), for the sake of preventing those frauds which have been before alluded to, to cut matters short at and from the act of bankruptcy, some inconveniences and hardships consequent upon the general object and prevalent design were not foreseen and known, but neglected for the sake of what was considered to be the greater good—the protection of the body of creditors? Supposing the sheriff to be, not excepted from, but included in the operation of the statute of Elizabeth, and that there may be some degree of hardship (if, in truth, that can be used as any argument at all) in such interpretation, all that can be said is, that he shares the same fate with others equally entitled to consideration, or, if the phrase be allowable, compulsive bonâ fide payments were to be refunded; harmless and honest dealings were avoided. Against which inconveniences the legislature, as your lordships are aware, have very properly and consistently granted relief. But an attempt by the courts of law to do the same would have been equally inconsistent and improper. In that relief, however, the sheriff is not included. Is he, then, within the words of the statute of Elizabeth, "a person claiming by, from, or under the offender?" It has been contended that he is not: and if by that it be meant to assert that he claims nothing for his own individual use and benefit, the observation is certainly not without truth; but it falls short of the purpose for which it is made. The creditor who sets the sheriff in motion clearly claims "from" the bankrupt: the vendee to whom the sheriff transfers the goods, claims "from or under" the bankrupt, or he gets nothing. Can I, then, say that the sheriff, who is so mixed up with the concerns of the bankrupt, in effectuating the claims

1837.

GARLAND v. CARLISLE.

of one against him, and transferring the title to another from him, is to be considered, with reference to the statute, as if he stood totally aloof from the transaction; and that, too, when, for the purposes of this action, and in order to constitute conversion in point of law, it is not necessary that any claim should be made for the party's own emolument? This was the very point decided in the case already referred to, of *Jenkins* v. *Smith*, the special verdict therein finding that what was there done was by a servant, and expressly *for the use of his master*.

I come now to consider the situation of the sheriff, and how far that can in any degree affect the question. And surely this is not the first occasion on which the responsibility of that officer has been heard of. That responsibility is the price which persons of figure and fortune are content to pay for distinction—one of those admirable arrangements in this country, by which men of possessions are made to contribute in proportion to them to the public good. I will not waste time by enlarging upon instances. But, what can be more responsible than his position with respect to bail? What more so with regard to the malversations of his subalterns, in cases even so much beyond or out of his duty? This, undoubtedly, is not without compensation; and, practically, no difficulty is found in providing officers to act under him. But, however, that may be, the sheriff having acted with some peril and liability around him in this instance, is no exception to or deviation from, but an illustration of, and in perfect conformity to, his usual course of duty. And, how is it in cases more immediately in connexion with the present—the execution of writs? If he be directed to take the goods of A., and he take those of B., he is answerable for the mistake. The like, of course, if he takes a wrong person. In this instance he has been directed to take the goods of the bankrupt, and he has taken those of the assignee. Why should not liability follow?

Maxims of the common law—"that no relation shall

make that tortious which was lawful"—and—"that relations are fictions of law, which shall do no wrong"—have been quoted with some reliance. How far general maxims or sayings are found to be of much value when they come to be applied to any particular state of facts, I will not undertake to determine. If, however, they are to be considered in the nature of rules which have grown up under the sanction and control of courts of law, it may be reasonable that the same authority which created them may also apply and bind them as to right and justice may seem meet. But, how they are to be applied to the construction of an act of parliament, I am quite at a loss to perceive. The question then only is, what has been enacted. I know of no rules of law, or logic either, which can have any bearing upon the subject, except such as may be supposed to aid and assist in the true interpretation of the statute, and the ascertainment of its meaning. Its provisions may be in policy unwise, in theory unjust; but, when a court of law fully perceives and understands what is written, it is ready to give judgment; its duty is complete. If it be (as any proposition can be) clear that the object of the legislature was, to pursue one main end and object—the vesting property in certain person or persons, from a by-gone period, by relation, overlooking or disregarding as comparatively immaterial, certain incidental inconveniences consequent upon that relation, of which, for the purposes of the present observations, the liability of the sheriff may be admitted to be one—an attempt to shew that such liability ought not to exist, either by the aid of maxims of law, or any other process of reasoning, is quite beside the legitimate purpose of ascertaining the intention of the legislature. It is argument, not to explain what *has* been done, but to prove what *ought* to have been done—what would have been reasonable, and what just: or, in other words, argument out of time and out of place.

1827.

GARLAND v. CARLISLE.

Upon the whole, upon the weight of authority, and the reason of the thing, if the question had been entirely new, I consider myself bound to give my answer in the affirmative.

First question.

GURNEY, B.—The first question upon which your lordships have required the opinion of the judges, is—whether a sheriff seizing and selling goods under a fi. fa. was, in December, 1824, liable in an action of trover brought by the assignees of the defendant in the action in which the fi. fa. was issued, such defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after such sale. The opinion which I have formed is in favour of the affirmative. This question depends upon the construction of the statute 13 Eliz. c. 7, which impowers the Lord Chancellor by commission under the great seal to appoint persons who shall have full power and authority *to take such order and direction* with the body of the bankrupt, *as also* with *his land*, and also with his *money, goods, chattels, wares, and merchandizes*, and *debts, wheresoever they may be found or known*, and *cause them to be appraised to the best value they may, and to make sale of the same, or otherwise to order the same for true satisfaction and payment of the creditors.* This is a plain, clear, distinct enactment. The first question is, what is the property of the bankrupt, respecting which the commissioners are to take order? The answer, it appears to me, must be—*The property which the bankrupt had at the time he became so.* The fact of his being bankrupt is not publicly known at the time it takes place—it is ascertained at a subsequent period—a commission issues—adjudication is made—assignees are appointed—to them the bankrupt's property is assigned—and *their title to the bankrupt's property relates back to the time of the bankruptcy.* It is, indeed, stated in the special verdict that these were the

1837.

GARLAND v. CARLISLE.

goods of Leonard, but by the subsequent commission of bankrupt and assignment became the property of the plaintiff, by relation, from the act of bankruptcy. This relation back is absolutely necessary for the prevention of fraud. Unquestionably this often produces great hardship to individuals. If that were not known when the statute passed, it has become known in a thousand instances since; and, in particular cases, the application of the rule has been restrained, not by the courts of law, but by the legislature. Where exceptions have not been introduced, the rule has been considered as inflexible. If the assignees have therefore a title to the property of the bankrupt, it appears to me to be a necessary consequence that they must be entitled to follow that property whithersoever it goes, and must have a right of action against any person who converts it; otherwise it is impossible that they can make due distribution among the creditors. In this case, at a period when the fact of the bankruptcy was not known (although it had taken place), the defendant, the sheriff, who was commanded to take the goods of Leonard, the bankrupt, took goods which *had* belonged to Leonard, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee; and he converted them. The defendant contends that he is not liable to this action of trover, because he is a public officer; that he was called upon to execute the process of the law; and that, at the time he executed it, he had no reason to doubt that the goods which he found in the possession of Leonard were his property. I admit the hardship, and regret that it exists. But the legislature has not made any exception in favor of a public officer under these circumstances: and I think that a court of law cannot supply that omission. This is the best opinion that I can form upon the act of parliament itself. And this would be my judgment were the case res integra.

The next question is, whether this act of parliament has

1837.

GARRARD v. CARLISLE.

in all times received a contrary exposition. If an act of parliament more than two centuries old has received one uniform construction it would perhaps be more safe to yield to that construction (even though it should not be quite satisfactory), than, by making a change, to unsettle the opinions and the practice of the profession and of the public. But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance with my own conviction. On the contrary, I find the cases and the practice, for a period of nearly eighty years, in favour of the construction which I have given: and the older cases, upon which reliance is placed for the opposite construction, appear to me to have been of doubtful authority.

The first case which is relied upon in favor of the plaintiff in error, is, *Bailey* v. *Bunning*, 1 Lev. 191, 1 Sid. 271, 2 Keb. 32, 33. This case is very imperfectly and confusedly reported. It was an action of *trover*; yet, if we can trust the reports, the discussion that took place would rather have induced the supposition that it had been considered to be an action of *trespass*. The finding of the jury, indeed, appears to have proceeded upon that supposion; for, they submit the question to the court upon the taking by the defendant, which would have been the question if the action had been *trespass*; but certainly was not the question when the action was *trover*. It appears, too, upon an examination of the postea, that, although the jury found the demand and refusal (which are evidence of conversion), they did not find the conversion; and the goods remained in the hands of the sheriff. Considering the actual finding of the jury, the discussion that took place, and the imperfect reports with which we are furnished, I cannot but think that much more importance has been ascribed to this case than it deserves.

The next case is, *Lechmere* v. *Thorogood*, 3 Mod. 236, and which came on again, as reported in 1 Show. 12. This

1837.

GARLAND v. CARLISLE.

was an action of *trespass*; and all that the court was called on to decide, was, whether *trespass* would lie; and they held that it would not. I agree entirely with the decision in that case, that *trespass* would not lie. The bankrupt could not bring the action; for, his property in the goods had ceased: the assignee could not bring the action; because *possession*, real or constructive, is necessary to sustain an action of trespass; and he had neither. His *property* related back, because the statute had given it to him. But the statute had not given a relation of *possession*. An action of trover was afterwards brought, and the plaintiff again failed: and Shower, in his report, says, it was decided, that, having brought trespass, and been defeated, trover could not now be sustained. The court did not decide that trover could not have been maintained, if that had been brought first. Whether the court decided rightly that the judgment for the defendant in the trespass was a bar to the action of trover, it is not necessary to inquire.

The next case is, *Cole* v. *Davies*, 2 Lord Raym. 724, which at best is but a Nisi Prius case. Lord Mansfield, in the case of *Cooper* v. *Chitty*, suggests a doubt of the correctness of the note: and, if Lord Raymond, in taking his note, omitted but two words, the law laid down will be unquestionable. If Lord Holt said, not that no action will lie, but *no action of trespass will lie against the sheriff*, because he obeyed the writ, then this case will not be inconsistent with what I conceive to be the law.

These cases appear to me to be but slender authority for deciding that the sheriff shall not be answerable for converting the property of the assignees of the bankrupt, under a warrant to levy on the goods of the bankrupt. The last of these cases occurred in the year 1698, and there does not appear to me to be anything to fill up the chasm between that case and the case of *Cooper* v. *Chitty*, which was decided in the year 1756. The case of *Cooper*

1837.

GARLAND v. CARLISLE.

v. *Chitty* was twice argued: and Lord Mansfield, assisted by Dennison, J., Foster, J., and Wilmot, J., delivered an elaborate judgment upon it. It is reported by Burrow, Blackstone, and Lord Kenyon; and I think the report by Lord Kenyon is the most distinct and satisfactory.

There is no doubt that the facts of this case of *Cooper* v. *Chitty* differ from the facts of the case before your lordships; inasmuch as the conversion was after the bankruptcy; but the value and the importance of the case consists in this—that the whole doctrine upon the subject of bankruptcy being amply discussed, Lord Mansfield illustrated with great perspicuity the distinction between trover and trespass, a misapprehension respecting which had before existed: and the court decided that the sheriff would not be liable to an action of trespass, but that he was liable to an action of trover, where the act of bankruptcy overreached the execution. The case is further valuable for this reason—that the preceding cases of *Bailey* v. *Bunning*, *Lechmere* v. *Thorogood*, and *Cole* v. *Davies*, were brought under the consideration of the court, and, so far as either of them can be considered as militating against the doctrine then laid down by the court, they were over-ruled. I think that the reasoning of Lord Mansfield is sound and convincing—that he has made the true distinction between trover and trespass; and it is certain that that solemn decision received the universal assent of Westminter Hall. It appears from the declaration of Burrough, J., in the case of *Lazarus* v. *Waithman*, that, when he entered into the profession, he found it settled and established law. That is confirmed by the case which occurred next after the case of *Cooper* v. *Chitty*, in 1772—*Hitchin* v. *Campbell*, 2 W. Blac. 779, 827, 3 Wils. 304. It appears that the assignees had first brought an action of trover against the sheriff for a conversion of the bankrupt's goods, in which they had failed; and they afterwards brought an action against the sheriff for money had and received, that money being

1837.

GARLAND v. CARLISLE.

the produce of the goods sold under the execution: and the court decided, that, inasmuch as the plaintiff had had judgment against him in the action of trover, he could not after that maintain an action for money had and received. In the report in Wilson, it is stated, that, *at the trial of the present action, it was proved that Anderson committed an act of bankruptcy before the 9th of March, to wit, in February.* This was necessary, to over-reach the execution. From this I think that the inference is, that, in the action of trover, the proof was not given. From what followed, it could not have been on account of the judge being of opinion that the action could not be maintained; for, occasion is taken by Lord Chief Justice De Grey, an able, learned, and accurate lawyer, to declare the law to be that which had been laid down by the court of King's Bench in the case of *Cooper* v. *Chitty*. The report in Blackstone is this:—"The legal effect of an act of bankruptcy committed by a trader, is, to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time, in case a commission be afterwards issued. This relation takes place in every instance but those excepted by statutes 1 Jac. 1, 21 Jac. 1, and 19 Geo. 2. Executions are not among those excepted cases; but are expressly declared void by the statute 21 Jac. 1, the commission being in the nature of an execution for the whole body of the creditors. By the old acts of Hen. 8, and Eliz., commissioners had a power of acting themselves in recovering the bankrupt's effects. Afterwards it became the practice to assign, which is allowed by 1 Jac. 1, c. 15. It was not till the 5th of Anne that assignees were directed to be chosen, which was revived by 5 Geo. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly *no trespasser* by taking the goods in execution after the act of bankruptcy and before the commission issued—so ruled in *Lechmere* v. *Thorogood*, in Comb. and Shower, and in *Cooper* v. *Chitty*, 1 Bur.

1837.

GARLAND v. CARLISLE.

20: but, by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action." This case occurred sixteen years after the decision in *Cooper* v. *Chitty:* and Lord Chief Justice De Grey and the court of Common Pleas adopt the principle laid down by the King's Bench in *Cooper* v. *Chitty*—distinguishing the case of trespass from that of trover.

The next case in order of time is the case *Smith* v. *Miles*, 1 T.R. 475, in 1786. At the time that case was argued and decided, there were but two judges sitting in the court: but they were judges of great authority—Mr. Justice Ashhurst and Mr. Justice Buller. That was an action of trespass against the sheriff: the act of bankruptcy was the first of February, and the commission the 27th; the adjudication of bankruptcy the 28th. The seizure by the sheriff was upon the 23rd. The goods were sold in the middle of the month of March. The court was of opinion that the action of trespass did not lie: but it declared its entire concurrence in the opinion of the judges in *Cooper* v. *Chitty*, that trover might have been maintained. Ashhurst, J., makes a long citation from the judgment of Lord Mansfield, to establish both positions, and then concludes—" The plaintiffs (the assignees) therefore are not injured, as it is competent to them to recover the value of the goods by bringing a proper action, viz. an action of trover: but the officer should not be harrassed by this species of action, in which the jury might give vindictive damages."

The next case is, *Potter* v. *Starkie*, 1807, cited in 4 M. & Sel. 260. The court of Exchequer held the sheriff liable in trover, though he had seized, sold, and paid over the money before the commission issued, and before any notice —saying this necessarily followed from *Cooper* v. *Chitty*; for, it was an unlawful interference with another's goods.

There is a case which has not been cited in the course

1837.

GARLAND v. CARLISLE.

of the argument: it is true it is only a Nisi Prius case; but I mention it as one of the very many that have occurred where the law has been treated as settled—*Wilson* v. *Milner*, 2 Camp. 452—an action for money paid and money had and received:—"On the 20th of February, 1809, the defendant sued out a fi. fa. into Middlesex, upon a judgment against one J. George; and the warrant to levy 155*l.*, besides poundage, was directed to the plaintiff, a bound bailiff of the sheriff of Middlesex. The plaintiff made his levy; and, on the 22nd February, paid over the 155*l.* to the fendant. On the 1st of March, a commission of bankrupt was sued out against George, and it was found that he had committed an act of bankruptcy on the 19th of February. His assignees immediately brought an action of trover against the sheriff and both the parties to the present suit, and recovered 152*l.* 18*s.* 6*d.* damages, together with costs, making up the sum of 216*l.*, the whole of which was paid by the bailiff to the assignees. It was contended, on the one hand, that the plaintiff was entitled to be completely indemnified by the defendant; and, on the other, that the action could not be maintained by the bailiff to recover back even the 155*l.*, which, if it could not be retained by the defendant, was money had and received to the use of the sheriff. Lord Ellenborough said: "I think the plaintiff cannot recover on the count for money paid. Among joint tort-feazors there is neither contribution nor implied promise of indemnity. *But the* 155*l. being paid to the defendant under a mistake respecting George's bankruptcy, I think it may be recovered as money had and received to the use of the plaintiff, who was answerable for it to the assignee.*

The next case in order is, *Lazarus* v. *Waithman*, 5 Moore, 312. In this case the goods were seized and sold by the sheriff after an act of bankruptcy, but before the commission; and it was decided that trover was maintainable against the sheriff. The case of *Bailey* v. *Bunning*

1837.

GARLAND v. CARLISLE.

and the subsequent cases were fully gone into; and the court adopted the judgment of the court of King's Bench in *Cooper* v. *Chitty* and *Smith* v. *Milles*, distinguishing actions of trover from actions of trespass.

The next case is *Price* v. *Helyar*, 4 Bing. 597, 1 M. & P. 541. In this case the subject was very thoroughly discussed; and the Lord Chief Justice, now a member of your lordships' House, pronounced the judgment of the court, affirming the doctrine of *Cooper* v. *Chitty* and the subsequent cases—adhering firmly to the distinction between actions of trover and actions of trespass.

The only remaining case is, *Dillon* v. *Langley*, in the King's Bench, 2 B. & Ad. 131. It was decided three days after judgment in this case had been given by the court of Common Pleas, and in conformity with it.

The cases which I have cited have the authority of nearly twenty judges who have sat in Westminster Hall who are not now living, and several who are now present. These cases appear to me to prove to demonstration what has been considered to be the law from the time of the case of *Cooper* v. *Chitty* until the case of *Balme* v. *Hutton*; and the judgment of the court of Exchequer in that case was reversed in the Exchequer Chamber. Besides the cases which have been reported, numerous cases have occurred at Nisi Prius, in which this doctrine has been held, and acted upon, and no motions made for new trials on the ground of misdirection, because this has been the general opinion of the profession. Against all this we have nothing but the plea of hardship. It is undoubtedly true that it is a hardship upon the *sheriff* that he should be liable to an action of any kind, when he has acted in ignorance and bonâ fide. But it is part of the infirmity of human legislation, that the general rule which it prescribes will work hardship in particular cases; and it is for the legislature to afford such relaxation of the rule as can be done with safety. This has been done from time

1837.

GARLAND v. CARLISLE.

to time with regard to this rule of relation; but the legislature has not relaxed it so far as to give relief to the sheriff in this case. The sheriff is exposed to other risks where he acts equally bonâ fide. The office is an office of risk and liability: but the sheriff receives ample remuneration for his risk as well as his trouble; and he cannot take the remuneration and shake off the liability. If he thinks that the risk is disproportioned to the remuneration, let him apply to the legislature for relief. His risks have been materially lessened by the legislature: his profits have not been abridged. There is not any case of hardship upon the sheriff under the bankrupt law which can be compared with the case of *Glasspoole* v. *Young*, 9 B. & C. 696, 4 M. & R. 533, which was an action of trover against the sheriff. The plaintiff, then a widow, had intermarried with one Mearing. The goods in question, at the time of the marriage, were her property. In the course of the next year, a judgment on a warrant of attorney was entered up against Mearing, and a writ of fi. fa. issued, under which the sheriff seized the goods in the house where Mearing and the plaintiff lived together as man and wife. The plaintiff believed herself to be his wife. An application was made to set aside the execution for some supposed irregularity, in which she made an affidavit as his wife. Two years afterwards, she discovered that he had a former wife living. She brought an action of trover against the sheriff, and recovered the value of the goods which he had taken. There was in that case every ingredient that could constitute a case of bona fides in the sheriff and of hardship in his being thus called upon long afterwards to pay the value of the goods which he had seized and sold: but the law was inflexible. Under a warrant to take the goods of Mearing, the sheriff had taken the goods of Glasspoole: and the court of King's Bench held that he was liable. This case was cited in the court below merely for the purpose of shewing the in-

1837.

GARLAND v. CARLISLE.

flexibility of the rule of law, and that it was a case of even greater hardship upon the sheriff than the case at bar. The learned counsel has pointed out that it does not entirely resemble this case, for that the fact of ownership in the defendant existed at the time, although it was not known to the sheriff. But a sheriff is not much benefited by the existence of a fact which he is unable to discover: and, if he had refused to levy on these goods, the judgment creditor might have attached him, because the defendant had possession of the goods as owner, and no one but himself knew that he was not.

I do not know that the hardship upon an officer who is well paid for his risk, is greater than that of many other persons upon whom the operation of the bankrupt laws is found to press, and upon whom it formerly pressed still more heavily. The preambles to the early statutes shew the unceasing jealousy of the legislature as to the frauds of bankrupts; and one after the other recites the difficulty of keeping pace with the secret frauds and contrivances which were resorted to to defeat creditors. Possibly it was owing to that that the relation back of the title of the assignees was long allowed to prevail to an extent which worked great injustice. Nevertheless, the courts of law contented themselves with expounding the law as they found it; and the repeated amendments which the law has received, it has received from the legislature. The statutes of the 1 Jac. 1, c. 15, 21 Jac. 1, c. 19, 19 Geo. 2, c. 32, and 46 Geo. 3, c. 65, have all been passed to relieve persons from the hardship occasioned by the application of this principle—*the relation back of the property of the assignee.* And, during the pendency of this cause, the interpleader act has extended the protection which before was given to the sheriff.

Second question.

Having answered that question in the affirmative, the second question which your lordships have proposed is—whether such sheriff was liable, if, after seizing the goods,

1837.

GARLAND v. CARLISLE.

he had permitted them to be disposed of according to an arrangement between the plaintiff and the defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage. This question I answer also in the affirmative. The sheriff having seized the goods, he is to proceed to a sale, unless he becomes satisfied that the goods are not the property of the defendant in the cause; and then it is his duty to abandon: if he abandons, he does not receive any poundage. Permitting the goods to be disposed of according to an arrangement between the plaintiff and the defendant, without proceeding to a sale, I consider a conversion. The goods were in his possession: permitting them to be disposed of appears to me to be the same thing as disposing of them himself. He cannot be allowed to say that he has not made an effectual levy; for, he has received the legal remuneration for an effectual levy—for an effectual levy to the whole amount of the debt. The case of *Thomson* v. *Clark*, Cro. Eliz. 504, decided that the sheriff, upon the writ of fi. fa., cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt. It is no part of the duty of the sheriff to step in, upon the requisition of the plaintiff, with a writ as the instrument to hand over the goods to him. His duty is clear: he is to sell or to withdraw. If he withdraws, not having disposed of the goods, or concurred in any arrangement for their disposal, he will not be liable to an action of trover, because he will not have been guilty of a conversion. But, if he does either the one or the other, I humbly conceive that he is liable.

PATTESON, J.—The first question proposed by your lordships being limited in point of time to the month of December, 1824, which was long before the statute 6 Geo. 4, c. 16, came into operation, the answer must depend upon

1837.

GARLAND v. CARLISLE.

the construction which ought to be put upon the previous statutes as to bankrupts, particularly the 13 Eliz. c. 7. The 2nd section of that statute authorizes the commissioners to make sale of the bankrupt's goods wheresoever they may be found or known, and enacts that what they shall do shall be good and effectual to all intents and purposes against the said offenders or debtors, "and against all other person or persons claiming by, from, or under such offender or offender, debtor or debtors, by any act or acts had, made, or done after any such person shall become bankrupt as is aforesaid." The previous statute 34 & 35 Hen. 8, c. 4, did not contain any words so strong as these; and the subsequent statutes passed in the reign of James the First in general refer to the statute of Elizabeth. But the 9th section of the 21 Jac. 1, c. 19, provides that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with or without penalty, or having attached goods of the bankrupt, whereof there is no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, and chattels, and other estate of such bankrupt, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, &c., for any more than a rateable part of their just and due debts with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment. This section appears to me not to affect the present question, but to have been framed with a view to do away with any distinction between debts of different natures or degrees, and to put all creditors on an equal footing, whether they have security or not. It, however, provides that judgment-creditors shall have no preference; and it follows that any execution levied after an act of bankruptcy cannot be sustained; and that any goods seized under such an execution must be dealt with

by the commissioners under the 13 Eliz. c. 7, s. 2: and so it may be considered to be a legislative exposition of that statute, as applying to executions, as well as all other dispositions of a bankrupt's property. The object of both statutes appears to have been, to avoid every act affecting the bankrupt's property after he has committed an act of bankruptcy, in order to insure an equal division among his creditors: and such has always been the effect given to them by courts of law. In *Billon* v. *Hyde*, 1 Ves. 328, Lord Hardwicke says: "By the act of bankruptcy, all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them: so that a sale of goods by the bankrupt after the act committed, is a sale of their property, and for which they may maintain trover. So it is as to the payment of money; and this was the intent of the act of parliament, the statute of James 1, c. 19, s. 14, being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing it. The relation the assignment has does not only overcharge acts done in pais, and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments: so that, if execution is taken out after the act committed, upon a judgment before, that execution is undone and set aside. It is said that this rule, founded on this act of parliament, is contrary to the general reason of the law, which says these fictions of law and legal relations shall not enure to the injury of any one; which is a general rule invented to support the right and equity of the case. But the reason for taking this case out of that rule is plain, and the law did intend it on this general rule, that it is better to suffer a particular mischief

1837.

GARLAND v. CARLISLE.

than an inconvenience: and the legislature foresaw there would be a particular mischief, which they cured by that proviso, but did not extend it further, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their judgment-creditors of their just debts: so, as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." Lord Hardwicke treats the relation of the act of bankruptcy as a positive enactment by statute, not as a mere fiction of law: perhaps his language in so treating it is not quite consistent with that which is attributed to him in *Brassey* v. *Dawson*, 2 Str. 978; but I apprehend that it is the true view of the subject, and, as such, has been generally adopted by the courts, and indeed by the legislature. The subsequent statutes which exempt from this relation certain specified cases, recognize and confirm its general operation—as, for instance, 19 Geo. 2, c. 32, as to payments in the ordinary course of trade—46 Geo. 3, c. 65, as to conveyances, contracts, and other dealings and transactions bonâ fide made and entered into more than two calendar months before the date and issuing of the commission; and more particularly the 49 Geo. 3, c. 121, s. 1, as to *executions* bonâ fide made and levied more than two calendar months before the date and issuing of the commission. This last statute is the more important to the present question, because it seems to me to be an exposition of the meaning of the second section of the statute of Elizabeth, and the 9th section of the statute of James, and to furnish a satisfactory answer to the argument raised at the bar, viz. that the sheriff does not claim "by, from, or under such offender or debtor." It is plain, that, by the 49 Geo. 3, if an execution be bonâ fide executed less than two calendar months before the commission, although in ignorance of

1837.

GARLAND v. CARLISLE.

the bankruptcy, it is not good. Why is it not? Because it is avoided by the statutes of Elizabeth and James; and the property is in the assignees by relation under the statute of Elizabeth, which it would not be unless the persons putting it in force were considered to claim "by, from, or under" the bankrupt. The truth is, that those who enforce an execution, and the sheriff amongst them, do claim "by, from, and under" the debtor, within the meaning of that statute; they claim to take the goods, because they are the property of the debtor: it is only on that ground they can claim them at all; they do not pretend to have any property in them themselves, but only to take them as being the goods of the debtor, in order to convert them into money, for the satisfaction of his debt. They claim, indeed, against the will and without the consent of the debtor, but not the less "by, from, and under" him: and the clause in the statute of Elizabeth was so framed in order to exclude from its operation persons claiming the goods as their own, asserting property in them, and denying them to be the goods of the debtor. Accordingly, it has hitherto been uniformly held that the execution-creditor is liable to the assignees in trover, if he takes part in the sale, or receives the proceeds, wherever there has been a prior act of bankruptcy, unless the case be within the exemption in the 49 Geo. 3. Not even a dictum is to be found to the contrary; and it is admitted, in the fullest terms, in the judgment of the court of Exchequer in *Balme* v. *Hutton*, 1 C. & J. 19. It is also held that a vendee of the goods at a public sale by the sheriff, is liable to the assignees in trover, under the same circumstances, and for the same reason, viz. that the goods were at the time of sale the property of the assignees, although no commission has then issued—*Farrant* v. *Thompson*, 5 B. & A. 826. Yet, if the goods are the property of the debtor, the vendee under the sheriff is not liable to an

1837.

GARLAND v. CARLISLE.

action, althouth the judgment or execution under which they are seized be set aside for irregularity—*Doe* v. *Thorn*, 1 M. & Sel. 425, or reversed on error—*Buckhurst* v. *Mays*, Vin. Abr. *Error*, I. 6., pl. 3, 4. If, then, the creditor who puts the sheriff in motion, and the vendee who takes by sale from him, being wholly ignorant of any act of bankruptcy, are nevertheless liable in trover, in consequence of the relation created by the statute of Elizabeth, in order to give full effect to the bankrupt law, what ground is there for exempting the sheriff from a similar liability? No provision to that effect is to be found in any of the statutes. If there be any such exemption, it must arise impliedly from the nature of his office, and the circumstances under which he is called upon to act. Now, his office is one of some profit and of considerable risk, in the taking of bail, in the execution of writs, independent of questions under the bankrupt laws, and in many other respects, to which he is exposed for the sake of the community by the common law and by legislative provisions. Instances of such risks are noticed in several of the judgments in the case of *Balme* v. *Hutton*, 1 C. & M. 272, and in the present case of *Carlisle* v. *Garland*, 2 C. & M. 31, to which I would beg to refer your lordships, rather than repeat them tediously. The circumstances under which the sheriff is called upon to act, are often difficult in cases such as are referred to in the first question proposed by your lordships. He is commanded by the writ to seize the goods of A., and he seizes goods in the possession of A., supposing them to be his property, and having no reason to doubt it. It turns out that A. had only a defeasible property in the goods, and that, by reason of subsequent events, they were by relation the goods of other persons from a time antecedent to the seizure: so that the sheriff, without any fault on his part, has not obeyed the writ; yet, if he had refused to seize the goods, and no commission had subsequently issued, he

would have been answerable in another way—to the execution-creditor, for such refusal. This appears to be very hard: but I cannot admit that hardship is in any case in itself a sound ground for a legal decision; the utmost effect it can possibly have, as it seems to me, is, to induce a doubt, and to make the mind pause before it acquiesces in a rule from which such a consequence will follow. If the argument of hardship could prevail, it surely ought to extend to the vendee, who has paid once for the goods, and has no remedy except by proof under the bankrupt's commission: whereas the sheriff has his action against the execution-creditor for money had and received—*Wilson* v. *Milner*, 2 Camp. 452; *Austen* v. *Ward*. 1 C. & P. 370, 507. The apparent hardship has, therefore, made me doubt, and examine the statutes relating to bankrupts, to see whether I could find anything in them pointing at any distinction between the sheriff and any other person concerned in putting an execution in force against the goods of a bankrupt. I have been unable to discover anything of the sort: and, when I recollect that the legislature has from time to time given relief in other cases of apparent hardship under the bankrupt laws, and more particularly in the year 1809, when the doctrine of the sheriff's liability in such cases was uniformly acted upon, has given relief with respect to executions more than two months before the commission, but has not then made any distinction as to the sheriff, I cannot but think that no such distinction was intended; and that, construing the statutes in their plain meaning, I am bound to say that the property is in the assignees by relation from the time of the act of bankruptcy, against all persons but the Crown; and that it follows of necessity that all persons who intermeddle with that property, not being within the exceptions of any of the statutes, are answerable for so doing.

Thus far I have stated my opinion upon the construction

1837.

GARLAND v. CARLISLE.

of the statutes, independent of the authorities upon this particular question. The authorities have been cited and commented upon so fully in the cases of *Balme* v. *Hutton* and *Carlisle* v. *Garland*, that I do not feel myself justified in occupying your lordships' time by again going through them. I admit that the case of *Cooper* v. *Chitty*, 1 Bur. 20, is not a direct authority upon the point. But, since that case, there are many authorities, which I need not cite, directly in point, that the sheriff is liable in trover, though not in trespass—a distinction for which I think I see good reason. But it is not necessary to discuss that point, since your lordships' question is confined to the action of trover. Opposed to these, are some other cases—*Cole* v. *Davies*, 1 Lord Raym. 724, which is at best but a Nisi Prius case, loosely reported—*Bailey* v. *Bunning*, 1 Lev. 178, 1 Sid. 271, 2 Keb. 32, of which case, speaking with all deference, I must say, as I have said before, that the reports of it are so confused and contradictory that I am really unable to discover what the court ultimately did decide, or upon what ground they decided—*Lechmere* v. *Thorogood*, 1 Show. 146, 2 Vent. 169, 3 Mod. 236, and *Lechmere* v. *Toplady*, 1 Show. 12, Comb. 123, decided only, first, that *trespass* would not lie, and secondly, that the judgment in an action of trespass was a bar to an action of trover; neither of which decisions are in point to the present question. I by no means agree that the modern decisions have proceeded, as has been supposed, on a mistaken notion with regard to the case of *Cooper* v. *Chitty*; for, I find, that, in many of them, the older cases, and that of *Bailey* v. *Bunning* in particular, were cited. The preponderance, therefore, of authority as to decided cases is greatly in favour of the liability of the sheriff, and the established practice was such that the law was considered as fully settled. Still, if I were satisfied that it had been so settled upon any erroneous principle, I should be bound to say so, and to point out what I considered to be the

1837.

GARLAND v. CARLISLE.

error, in answering the question put by your lordships; although, in the courts below, I might not feel myself at liberty so to do. But, for the reasons already given, I think that the modern decisions are correct. The cases of *Prickett* v. *Downe*, 3 Camp. 131, and *Foster* v. *Allanson*, 2 T. R. 479, were pressed at the bar; in which it was held that the fact of an act of bankruptcy having been committed by the plaintiff was no answer to an action brought by him, and the reason given was, that, if the plaintiff should recover, and the defendant pay under process of law, the assignees under a subsequent commission could not sue him for the same debt. How far those decisions are consistent with the provisions of the statutes of Elizabeth and James, may perhaps be doubted. They can, at all events, apply only to cases arising on similar facts; and do not, as it seems to me, authorize the introduction of another exception to the retrospective operation of the bankrupt laws.

In answer, therefore, to your lordships' first question, I am of opinion that the sheriff, under the circumstances herein stated, is liable to an action of trover brought by the assignees.

Second question.

In answer to your lordships' second question, I am of opinion that the sheriff, having seized goods under the circumstances mentioned in the first question, and having permitted them to be disposed of according to an arrangement between the plaintiff and the defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage, is liable in the same manner as if he had himself sold them. I consider the sheriff to have seized under a writ of fi. fa. against the bankrupt goods which turn out to be the property of the assignees. He has permitted two persons to dispose of these goods, neither of whom had the absolute property in them. The plaintiff in the action had no property whatever in them: the defendant had but a defeasible property; and the

1837.

GARLAND v. CARLISLE.

sheriff, by his acts of permission, and receipt of poundage, has made himself a party to the disposition of the goods of the assignees, without their authority or consent, which I have no doubt makes him liable to an action of trover.

Third question.

With respect to the third question proposed by your lordships, I presume that I ought not to offer any opinion, as I have answered the first question in the affirmative.

First question.

BOSANQUET, J.—Upon the subject of the first question proposed by your lordships, I expressed my opinion judicially in the case of *Balme* v. *Hutton*, which has been repeatedly cited in the course of this discussion: and, notwithstanding the arguments which I have heard at your lordships' bar, I am still of opinion that a sheriff is liable to be sued by the assignees in an action of trover, under the circumstances supposed by the question.

It is agreed on both sides that the general effect of the statutes 13 Eliz. c. 7, s. 2, and 21 Jac. 1, c. 19, s. 9, is, to vest in the assignees the property of the bankrupt by relation from the act of bankruptcy; and that persons in general who intermeddle with the property between the act of bakruptcy and the assignment, are liable to be sued by the assignees in an action of trover. Even a judgment-creditor who claims under a writ of execution issued before the act of bankruptcy, is liable to be sued by the assignees in that form of action, if the writ has not been executed by a seizure till after the act of bankruptcy, whether the goods were sold under the execution before or after the assignment. The relation thus established by statutory authority, which vests the property in the assignees ex post facto, unquestionably produces occasional hardships of considerable magnitude. But it was adopted by the legislature for the necessary prevention of fraud. Certain inconveniences which might without much danger be provided for, have from time to time been obviated by particular statutes. But many still do and must remain,

unless the great principle of the bankrupt laws, an equal distribution among the creditors, is to be abandoned. Even at this time, the vendee of a sheriff who purchases bonâ fide under an execution executed by seizure after an act of bankruptcy, and completed by sale before the assignment, is neverthelss liable to be sued in trover by the assignees. While adverting to this point, I beg leave to correct a mistake in the opinion which I delivered in *Balme* v. *Hutton*, where I inadvertently used the word "sale" instead of seizure;" saying that the vendee would be liable if an act of bankruptcy appeared to have been committed before the *sale*, when I ought to have said, before the *seizure*.

But, an exemption in favour of the sheriff himself is contended for, not on account of any exemption to be found in the statutes, which are altogether silent with respect to him, but on account of the nature of his office, by which he is compellable to execute the writs entrusted to him. There is no doubt that a sheriff may, without any fault of his own, at times incur considerable hazard in the discharge of his duty. But it is the peculiar nature of his office which subjects him to this risk. Though he may sometimes suffer from it, much practical advantage occurs to the public from his responsibility. The execution of writs according to the ordinary course of practice is not undertaken by the high sheriff in person, nor by his undersheriff. It is conducted by subordinate officers, in inferior situations of life; from whose conduct, unless guarded by strict responsibility, collusion may reasonably be apprehended. Accordingly, the high sheriff takes security from the undersheriff, who takes security from the bailiffs. From the discharge of their duty considerable profits arise; and there is no difficulty in finding persons willing to undertake the risk for the sake of the emolument. There can be little doubt, that, if the seizure of goods under a writ of execution by the sheriff's officer after an

1836.

GARLAND v. CARLISLE.

act of bankruptcy, were sufficient to excuse a sale by the sheriff before assignment, the property, which ought to be equally divided among the creditors, would, in numberless cases, be collusively disposed of to fictitious or favoured creditors, who, when sought for by the assignees, would either have absconded or be found insolvent. The relation out of which this responsibility arises, is created by statute: and it must be remarked that it is not the only case in which the sheriff is subjected to heavy responsibility in consequence of a statutable duty which he is compellable to execute, and in the execution of which he may be wholly without blame. The sheriff, upon making an arrest, is bound to discharge the defendant upon a bail-bond, if good bail are tendered; yet, if the bail, who are perfectly solvent when the bail-bond was taken, become insolvent in the interval between that time and the time for the appearance in court of the defendant, and the defendant cannot be found, the sheriff must pay the debt. This liability operated with peculiar hardship upon the sheriff before the passing of the uniformity of process act; when the arrest might have taken place at the end of Trinity Term, and the time for appearance not arrive till the beginning of Michaelmas Term.

It has been suggested that the sheriff, though not expressly exempted by the terms of any statute, yet is not included within the description of persons in the statute of Elizabeth, against whom the bargain and sale of the commissioners shall be good and effectual to all intents and purposes, because he is not a person "claiming by, from, or under the bankrupt, by any act had, made or done" after the bankruptcy. By what right, then, it may be asked, does the sheriff claim to meddle with the property at all, unless it be by the act of the execution-creditor in delivering a writ into his hands, which act of delivery takes place after the bankruptcy? The words of the statute are not confined to acts of the bankrupt

1837.

GARLAND v. CARLISLE.

himself. It is clear that the execution-creditor is barred of any right to require the sheriff to levy for his debt at the time when he delivers the writ to him for that purpose. The sheriff, therefore, can derive no authority from him whose personal interference in the execution would be tortious and the undoubted subject of an action of trover. If the effect of the bankrupt statutes is to be confined to persons strictly claiming under the bankrupt, all tort-feazors between the act of bankruptcy and the assignment, who, without any pretence of right under the bankrupt, have interfered with and disposed of the property, will be exempted from liability to answer the assignees in an action of *trover*, as well as the sheriff. But such a construction would be utterly inconsistent with the received interpretation of the bankrupt laws, and the express provision of the statute 21 Jac. 1, c. 19, s. 9, that all those laws shall be largely and beneficially construed and expounded for the help and relief of the creditors.

These reasons, independently of authority, appear to me to afford strong ground for holding that the sheriff, as much as all other persons who do any thing between the act of bankruptcy and the assignment which amounts to a conversion of the bankrupt's goods, is liable to an action of trover at the suit of the assignees. But decisions upon the subject, express and numerous, have taken place in all the courts of Westminster Hall.—The courts of Exchequer, Common Pleas, King's Bench, and Exchequer Chamber, have successively declared that a sheriff, under the circumstances stated in your lordships' first question, is liable in an action of trover: and, if I thought the question, in the absence of all authority, more doubtful than I consider it to be, I should not feel myself authorized, in opposition to such concurrent authorities, to advise your lordships that an interpretation adopted in so many judicial determinations, and which is not inconsistent with the language of any statute, ought to be adjudged erroneous.

1836.

GARLAND v. CARLISLE.

I forbear to cite the cases which have been so often mentioned.

In addition to the decisions which appear in the printed reports, we learn from Mr. Justice Burrough, who was called to the bar in 1773, that the point was settled before he knew Westminster Hall; and from Mr. Justice Richardson, whose extensive practice both as a pleader and at the bar is well known, that it had been (in cases) long since settled, and had frequently occurred of late years at Nisi Prius.

All the decided cases above alluded to were professedly founded upon the doctrine laid down by Lord Mansfield in *Cooper* v. *Chitty*, in 1756, and the practice which had prevailed in consequence of that doctrine. The facts in *Cooper* v. *Chitty* certainly were not identical with those stated in your lordships' question: but the practice which obtained, and the decisions which followed that case, have been considered as necessary consequences of the principles there promulgated. Lord Mansfield in that case, after stating, that, in an action of trover, two things are nccessary to be proved—property in the plaintiff, and a wrongful conversion by the defendant—proceeds distinctly (perhaps more distinctly than had before been done) to declare that the property of a bankrupt vests in the assignees at and from the act of bankruptcy, by relation; that the sale by the commissioners is good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served or executed before by the act of bankruptcy; that dispositions by process of law are put upon the same foot with dispositions by the party—to be valid, they must be completed before the act of bankruptcy; that the sheriff acts at his peril, and is answerable for any mistake; that, although he may not be liable to answer as a trespasser for laying his hands upon the goods by seizure, yet that the taking is not lawful, because the goods are the property of a third person,

but is nevertheless so far excusable that the sheriff shall not be made a trespasser by relation; and that, if the sheriff convert the goods by a wrongful sale, he is liable to be sued in trover as well as any other person. He certainly notices, and in some degree relies upon, the conversion by sale having taken place after the commission and assignment: but if, according to Lord Mansfield, "dispositions by law are put upon the same foot as dispositions by the party;" if the vendee of the goods between the act of bankruptcy and assignment is liable to be sued by the assignees in trover for a wrongful conversion; if the sheriff act at his peril, and is answerable for a mistake, and if trover be the proper remedy where the sheriff is guilty of a conversion, it seems to follow that the sheriff who sells during the interval between the act of bankruptcy and assignment, must be deemed guilty of a conversion, and be liable to an action of trover; unless an exemption founded on statute or judicial authority can be established in his favour. The sale in *Cooper* v. *Chitty* having in fact taken place after the assignment, it was natural that Lord Mansfield, after having stated the general principles to shew that the excusable character of the seizure did not, as had been contended, justify a sale, should advert to the actual period of sale, which in the case before him put the question of conversion beyond all doubt. This he might think the more proper, as the special verdict in *Bailey* v. *Bunning* was not before him, and that case had been cited to shew that the sheriff who had seized and detained goods between the act of bankruptcy and the assignment was not liable in an action of trover, and also to shew this, that the dictum of Lord Holt in *Cole* v. *Davies*, which had been cited, whatever he might think of it, was not applicable to the case in judgment. If the inferences which have been drawn from the case of *Cooper* v. *Chitty* depend upon the particular circumstances, and not upon the principles which are found in it, that case is

1837.

GARLAND v. CARLISLE.

not an authority for the practice or the decisions which have followed it; and it has been argued that the cases which preceded it are adverse to the practice and decisions which have been founded upon it. The cases preceding it which have been cited are six in number. Of the cases of *Turner* v. *Felgate* and *Lechmere* v. *Thorogood* it is sufficient to say that they were actions of trespass, and can decide nothing with respect to the sheriff's liability in trover. *Lechmere* v. *Toplady* was indeed an action of trover; but the only question there was, whether the acquittal in a preceding action (*Lechmere* v. *Thorogood*) which had been brought in trespass for seizing and carrying away the same goods, the causes of action being averred to be the same (see the pleadings, 2 Vent. 156), was a bar to a second action in trover for the same cause; and it having been determined that it was a bar, the liability of the defendant in trover, under the circumstances of the case did not come in question.

Thompson v. *Phillips* was an action of assumpsit brought by assignees against an execution-creditor for money received of the sheriff under an execution levied between the act of bankruptcy and assignment; in which the court held that the assignees ought not to have sued in assumpsit for the money, but in trover for the goods. Whether the action of trover should have been brought against the sheriff who levied, or against the creditor who received the money, but who does not appear to have interfered with the goods, the court do not say. If trover for the goods could be maintained against the execution-creditor, it would hardly be contended at the present day that he might not be sued for the proceeds in an action for money had and received. *Bailey* v. *Bunning* was an action of trover against the sheriff who seized goods after an act of bankruptcy, and before the assignment, under a writ which was antedated, and refused to deliver them after demand made. The only question in that case was, whether the

taking, that is, the seizure under the writ, was lawful. The sheriff detained the goods, but did not sell them. After the assignment, the special verdict finds a demand and refusal, which it is well known do not amount to a conversion: consequently, unless the seizure itself was a conversion, the sheriff could not be liable in trover. The special verdict stated, that, if the taking was lawful, the jury found for the defendant; if not, for the plaintiff: and the court held that the issue was found for the defendant; for, the taking by virtue of the writ was in their opinion lawful. This is exactly the doctrine of Lord Mansfield. The mere taking possession by the sheriff is excusable, if he do no more; but, if he proceed to a sale, or otherwise dispose of the goods, it is a conversion, for which he is answerable in trover. And this is consistent with the observation often made that the sheriff may apply to the court for time to return the writ; which implies that, having taken possession of the goods under the writ, his merely keeping them in custodiâ legis till the return of the writ, for the purpose of ascertaining to whom the goods belong, could not be deemed a conversion. It also agrees with the opinion delivered by Lord Ellenborough in *Wyatt* v. *Blades*, 3 Camp. 396, which was an action of trover against a sheriff for seizing in execution and carrying to a broker goods of a bankrupt after a secret act of bankruptcy, but before the commission, which goods continued at the broker's unsold, in consequence of a notice to the sheriff not to sell. His lordship says: "Had the goods not been *removed*, it would have been difficult to say there was any conversion: but I think the removal of them after an act of bankruptcy is a sufficient conversion to maintain the action, notwithstanding the subsequent notice." There are many other authorities, ex. gr. *Solomon* v. *Dawes*, 1 Esp. 83, *Green* v. *Dunn*, 3 Esp. 215, a dictum of Coke, Bulstrode, 312, and of Chambre, J., 2 B. & B. 449, to shew

1837.

GARLAND v. CARLISLE.

that reasonable hesitation in a doubtful case to deliver goods upon demand, does not amount to a conversion.

If the case of *Bailey* v. *Bunning* be urged as an authority for holding any imputed conversion by the sheriff except the seizure excusable, it may be answered that nothing but the seizure occurred in that case before the assignment; and it is not contended that an act of the sheriff amounting to a clear conversion, such as a sale after the commission and assignment, would not subject him to an action of trover.

The only remaining authority prior to that of *Cooper* v. *Chitty*, is *Cole* v. *Davies*, 1 Lord Raym. 724, which was an action, not against the sheriff, but against assignees of the bankrupt, in which Lord Holt is reported to have said at Nisi Prius, that, if the sheriff seizes and sells goods of the bankrupt after the bankruptcy and before commission, the assignees may maintain trover against the vendee, but *no action* lies against the sheriff. This gratuitous observation ascribed to Lord Holt at Nisi Prius was entirely beside the cause in hand, which was an action against assignees, apparently brought to recover from them goods sold to the plaintiff under an execution before the bankruptcy, and collusively left in the bankrupt's possession. Whether the observation be or not correctly reported, it is not supported by any preceding known authority; and it was treated by Lord Mansfield as a loose note of what was said obiter, having a manifest reference to *Bailey* v. *Bunning*, which it has been seen does not support it, that case having turned altogether upon the seizure under the writ, and no sale or other disposal of the goods having taken place before the commission. The dicta of many judges, commencing as early as 1772, and several passages from practical writers, have been referred to for the purpose of shewing the prevailing impression in Westminster Hall soon after *Cooper* v. *Chitty*, in 1756, and long prior to the case of *Potter* v. *Starkie*, in 1807: but, unless it can

1837.

GARLAND v. CARLISLE.

be clearly established from an examination of the authorities before *Cooper* v. *Chitty* that they are at variance with those which have since taken place, I humbly apprehend that the latter decisions, considering their number, and the weight of authority which they carry with them, ought to prevail.

Upon your lordships' first question, therefore, I am humbly of opinion that a sheriff seizing and selling goods under a fi. fa. was in December, 1824, liable in an action of trover brought by the assignees of the defendant in the action in which the fi. fa. was issued, such defendant having committed an act of bankruptcy before the seizing and selling of the goods, but no commission having issued until after such sale.

Second question.

Your lordships have been pleased to inquire, secondly—If the first question be answered in the affirmative, then, whether such sheriff was liable, if, after seizing the goods, he had permitted them to be disposed of according to an arrangement between the plaintiff and the defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage. In answer to which second question, I am humbly of opinion that he was liable. If by proceeding to a sale in the ordinary course of executing the writ, he would be guilty of a conversion, he could not be less guilty in allowing a proceeding to take place between other persons by which the goods seized under the writ were tortiously disposed of, and taking a profit in the shape of poundage upon such proceeding.

Third question.

Your lordships inquire, thirdly, If the first question be answered in the negative, then, whether such sheriff was liable, if, instead of selling the goods, he had concurred in an arrangement between the plaintiff and the defendant in the action, under which the goods were delivered to the plaintiff in the action, in satisfaction of his demand, the sheriff receiving his poundage. Upon this third question, I am humbly of opinion, that, however excusable the

1837.

GARLAND v. CARLISLE.

sheriff may have been in seizing and selling the goods between the act of bankruptcy and the assignment, in the ordinary course of his supposed duty, yet that, by concurring in an arrangement for the delivery to the plaintiff of the goods in his custody under the writ, in a manner not authorised by the writ, he loses any right to avail himself of the character of sheriff, and subjects himself to answer for any conversion in the same manner as those to whose wrongful act he has made himself a party. A *removal* of goods for the purpose of sale under the writ, though no sale actually take place, is a conversion, according to the doctrine of Lord Ellenborough in *Wyatt* v. *Blades*, before referred to. Consequently, an actual delivery of the goods to the execution-creditor in satisfaction of his debt, without sale, if wrongful, must à fortiori amount to a conversion.

A writ of fi. fa. in December, 1824, would, according to the law and practice then in force, have been tested of the preceding Michaelmas Term, and returnable in Hilary Term following, by which the sheriff would be commanded to cause to be made of the defendant's goods a certain sum of money for debt and costs, and to have that money before the court at the return day, to render to the plaintiff, and to have then there that writ. If, instead of pursuing the directions of the writ, and levying the money, the sheriff, after taking the goods of the defendant, delivered them or voluntarily allowed them to be delivered without sale to the plaintiff in the execution, he took upon himself to dispose of the goods in a manner not authorised by law. The receipt of the poundage which he might have lawfully taken upon a levy of the money, shews the connection of the sheriff with the transaction; but it cannot have the effect of converting an irregular and extra-official disposal of the goods into a regular levy of debt and costs by virtue of the writ. It is laid down in *Langham* v. *Wallis*, 2 Lutw. 589, that the law requires

1837.

GARLAND v. CARLISLE.

of sheriffs a strict execution and observance of the king's writs directed to them; wherefore it was adjudged in *Walker* and *Wedall's* case, Noy, 107, that, if the sheriff levy goods upon a fi. fa., and afterwards pay the plaintiff with his own proper money, still he cannot retain the goods; and, for the same reason, it had also been adjudged that a sheriff cannot deliver the goods taken by him upon a fi. fa. to the plaintiff in satisfaction of his debt. For which last position was cited as in point, *Thompson* v. *Clerk*, Cro. Eliz. 504, Noy, 55, and *Bealy* v. *Sampson*, 2 Vent. 93. So, Holt, C. J., says, in *Pullen* v. *Purbeck*, 1 Lord Raym. 316, upon an elegit, the sheriff may deliver goods to the party; but not upon a fi. fa. And the practical books, Dalton, Impey, and Tidd, repeat the same rule.

In departing from the official course, the sheriff acts at his peril: and if the goods wrongfully delivered to the plaintiff in the execution turn out in the event to have been the goods of the assignees, the sheriff, like any other person, must be answerable in trover for this wrongful conversion, though he may, on account of the nature of his office, have been excusable for the act of taking possession.

For these reasons, I am humbly of opinion that the sheriff was liable, under the circumstances stated in your lordships' third question, as much as under those stated in the first and second.

First question.

BOLLAND, B.—In offering my reasons to your lordships for answering the first question proposed to the judges in the negative, it will be obvious to your lordships, that, as my view of this matter remains unchanged, it will be difficult for me to avoid in some degree following the same train of argument that I adopted in the court of Exchequer Chamber in delivering my opinion upon the writ of error brought on the judgment of the court of Common

1837.

GARLAND v. CARLISLE.

Pleas upon the special verdict found upon the trial of this cause. As the opinions of the judges in the court of Exchequer Chamber are fully given in the books of Reports, I shall consider it my duty to compress into as small a compass as possible the observations I have to submit, and not to occupy more of the time of this House than the importance of the question necessarily requires. The claim of a plaintiff in an action against a sheriff rests upon a statutory provision, by which the property of a bankrupt at the time of his bankruptcy is subjected to the operation of a commission against him. The case of *Balme* v. *Hutton* was decided in Michaelmas Term, 2 Will. 4, in the court of which I am a member, after a most anxious consideration of all the cases that are to be found in the books that are authorities upon this question; an elaborate judgment was delivered by the learned Lord Chief Baron as the unanimous opinion of the court: and I might rely upon that decision as governing the present question, did I not know that a great difference of opinion exists in the minds of the judges respecting it.

The late statute, 6 Geo. 4, c. 16, by which the law of bankruptcy is now regulated, though it differs in some parts from former acts, furnishes no ground for a difference of construction with reference to the question before me. The cases, therefore, that have arisen on former statutes are to be looked upon as authorities.

A sheriff is a ministerial officer. He acts in the execution of his duty, in obedience to a command of one of the superior courts of justice. The proceeding is not for his benefit. It is in the king's name. The property at the time of the seizure is in the bankrupt. Such being the state of things, it does appear to me very great injustice to make this public officer a wrong-doer in consequence of subsequent events over which he has no control whatever. It is only by relation, therefore, that he can be made so. Let me examine the law as to the doctrine of

relation. It is laid down in 3 Rep. 29. b., that no relation shall make that tortious which was lawful, for, relations are fictions of law which shall never do wrong. Ventris, J., says, relations shall not do wrong to strangers; they are fictions in law, which are always accompanied with equity—2 Vent. 200. In speaking of the relation of the act of bankruptcy, Mansfield, C. J., observes: It is in all cases extremely hard; in some cases extremely shocking; and is not to be carried further than we are compelled. If the sheriff acts honestly, is it not enabling relation to do wrong, to extend it to this public officer; and, shall this injustice be done to benefit those to whom a degree of negligence may be imputed in not issuing a commission immediately after the act of bankruptcy was committed? But it is said this hardship upon a sheriff cannot operate in his favor; and instances are adduced in which the law holds him answerable for acts performed in the course of duty, and in which he has been innocent and honest. It must be admitted that many and very serious liabilities are thrown upon sheriffs; but those liabilities were known to the courts that decided the earlier cases; and yet those cases establish a distinction between the responsibility of a sheriff and an execution-creditor. I allude to *Bailey* v. *Bunning*, *Lechmere* v. *Thorogood*, and *Cole* v. *Davies*: and this doctrine is fully recognized in *Turner* v. *Felgate*, 1 Lev. 95. The case of *Bailey* v. *Bunning*, 1 Lev. 173, is the earliest, I believe, on this point. It was an action of trover against a bailiff. The jury found a special verdict. On the 6th June, J. S. committed an act of bankruptcy. On the 11th June, J. D. sued out a fi. fa. against the goods of J. S., tested the 4th of June, under which the defendant seized: a commission against J. S. afterwards issued, and the goods were assigned by the commissioners to the plaintiff. If the taking by the defendant were lawful, the jury found for him; if not, for the plaintiff. It is unnecessary to state the grounds upon

which it was argued at the bar. It came on first in Trinity, 17 Car. 2. Judgment was not given till Easter Term following. The case was decided in favor of the defendant, he being an officer obliged to execute the writ, who could not know of the act of bankruptcy or that any commission would be sued out. It is also reported in 1 Sid. 271, and is put by him on the official character of the defendant only. It is observed in the report of *Cooper* v. *Chitty*, 1 Bur. 35, by Lord Mansfield, that Siderfin does not seem to know what the court was going upon: for the court tied it up to the taking; whereas he does not seem to distinguish between the trover and the trespass. It must be admitted the report is imperfect in some particulars; but, as to the grounds of the judgment, Siderfin agrees with Levinz; and it is material to observe, that, in the report of *Phillips* v. *Thompson*, in the Common Pleas, by Levinz, vol. 3, p. 193, the judges, in noticing *Bailey* v. *Bunning*, stated that that case was decided solely in excuse of the bailiff, who ought to be excused for executing the writ, and not on the ground that the goods were bound by the writ: and it must not be lost sight of, in estimating the weight to be given to the reports in the third volume, that they are reports of cases determined during the time that Levinz was a Judge of the court of Common Pleas, and of others which were decided after he was removed from the Bench. It appears, therefore, that *Bailey* v. *Bunning* may be relied on as an authority, that, in the case of an officer, an act would be lawful, which, if done by an ordinary person, would be an unlawful taking, and subject the doer to an action of trover. *Lechmere* v. *Thorogood* is the next authority. It is to be found in 3 Mod. 236, 1 Show. 12, Comb. 123. It was an action of trespass by the assignee of a bankrupt against the sheriff of London and others for seizing the goods of the bankrupt after an act of bankruptcy by him. The act of bankruptcy was committed on the 28th of April; the seizure was on the 29th: it was put

1837.

GARLAND v. CARLISLE.

by Shower, arguendo, that, though the statute vested the goods in the assignee, yet this relation shall not work a wrong, to make the officer a trespasser, who had a good authority, and took the goods lawfully; and so is the case of *Bailey* v. *Bunning*. The court was clear that this action lay not against the officer, though trover would against the party: and so judgment for the defendant. Here, again, the distinction between officers and other persons is recognized by the court; and, though the action was trespass, it is clear from the report that the decision would have been the same had it been trover. In *Cole* v. *Davies*, Lord Raymond, at p. 724, reports Holt, C. J., to have ruled at Nisi Prius, that, if the goods of A. be seized upon a fi. fa. issued upon a judgment against A., and after the seizure A. becomes bankrupt, this act of bankruptcy cannot affect the goods levied in execution as aforesaid; but, if A. was a bankrupt before the seizure and after the bankruptcy, the sheriff, upon a writ of fi. fa. to him directed upon a judgment obtained against A., seizes the goods and sells them, and a commission of bankruptcy is granted, and the said goods assigned by the commissioners, the assignees may maintain trover against the vendee of the goods, but no action will lie against the sheriff, because he obeyed the writ. That was a decisive authority, and must have prevailed with the court in *Cooper* v. *Chitty*, and led them to a different decision from that they came to, had not the authority of the report of *Cole* v. *Davies* been impeached by Lord Mansfield upon the ground of Lord Raymond being young at the bar, and that it was a loose note of what was said obiter. With the highest respect for every opinion delivered by so great a man as Lord Mansfield, I take the liberty of saying that the four resolutions in Lord Raymond's report, of which that I have extracted is the first, appears, as far as the report is concerned, to bear the stamp of accuracy: the positions laid down are plain and simple, and such as

1837.

GARLAND v. CARLISLE.

Lord Raymond could not fail to comprehend. The case of *Cole* v. *Davies* was tried by Lord Holt in Hilary Term, 1698. Lord Raymond, after twenty-six years' practice from that time, was elevated to the bench, and presided as Chief Justice for nine years: so that ample time and opportunity were afforded to his lordship to have corrected his MS. of the report, if it had been liable to the imputation of inaccuracy by which Lord Mansfield attacked and destroyed its authority.

The case of *Cooper* v. *Chitty* was an action of trover by the assignees of a bankrupt against the sheriffs of London. On the 4th of November the trader committed an act of bankruptcy; on the 5th a fi. fa. issued against his goods; on the 8th a commission was sued out, and an assignment of his property was executed; on the 28th, the sheriff sold the goods. Thus, the seizure was at a time when the sheriff was ignorant of the act of bankruptcy; but the sale was twenty days after the commission and assignment, and when the bankruptcy was notorious. No notice could be fuller: and it seems that the judgment proceeded upon the fact of the sale having been after notice of the bankruptcy, and that the sheriff had done an act which even in his character of a public officer amounted to a wrongful conversion, and rendered him liable to answer to the assignees in an action of trover; but that the seizure, even after the act of bankruptcy, was, in the case of the defendant, as sheriff, excusable. The court of Exchequer, in its judgment in *Balme* v. *Hutton*, after having taken the same view of the case of *Cooper* v. *Chitty* as I have, at very great length pointed out many expressions of Lord Mansfield, to shew that he never could have intended that case to bear the extended operation contended for on the part of the plaintiff. As the judgment is fully reported, I should very unnecessarily consume the time of your lordships were I again to state it.

In 1807, the case of *Potter* v. *Starkie* was tried before

1837.

GARLAND v. CARLISLE.

Mr. Baron Wood, at Lancaster. It appeared on the trial, that, on the 1st of the month, a fi. fa. was delivered to the sheriff, and on the 2nd J. S. committed an act of bankruptcy: the sheriff seized on the 3rd. The court held the sheriff liable. A rule nisi for a new trial was obtained. *Cooper* v. *Chitty* and *Timbrell* v. *Mills* were quoted and relied on by Richardson, then counsel for the sheriff; and it was contended that the ground of decision in those cases was, that the sale was after the assignment, when the sheriff must be taken to have had notice of the bankruptcy. It was argued in favour of the plaintiff, that the sheriff had not taken the goods mentioned in the writ, i. e. the goods of J. S.; but of other persons; and that he was therefore guilty of a conversion. The rule was discharged. Best, C. J., in his judgment in *Price* v. *Helyar*, says: "We were anxious, however, to inquire about the case of *Potter* v. *Starkie*; and we learn from Richardson, J., that the report of that case in the argument in *Maule* v. *Selwyn* is accurate; that the court of Exchequer did decide in the manner there stated, and gave the reasons there assigned, that the case depended upon the previous decision in *Cooper* v. *Chitty*; and we think the case of *Cooper* v. *Chitty* embraces the principle upon which we now decide." The case of *Potter* v. *Starkie* was therefore determined upon the single authority of *Cooper* v. *Chitty*. *Bailey* v. *Bunning* and *Cole* v. *Davies* were not referred to either at the bar or by the court: no distinction was drawn between the officer, the minister of the law, and the execution-creditor, by whom and for whose benefit the law is put in motion. *Wyatt* v. *Blades*, 3 Camp. 396, was a case tried before Lord Ellenborough: it was trover for taking the bankrupt's goods in execution after a secret act of bankruptcy. The act of bankruptcy was on the 8th December. The sheriff seized under a fi. fa. on the 8th February, and removed the goods: a commission issued on the 21st; and notice not to sell was served on the sheriff. The sheriff

1837.

GARLAND v. CARLISLE.

did not sell. No point was raised but upon the conversion. And Lord Ellenborough held the removal of the goods sufficient to make the officer liable. It must, however, be observed that the cases that had made a distinction between the liability of the sheriff and that of other persons, were not at all brought under the consideration of his lordship. The cases of *Lazarus* v. *Waithman*, in which the sale was before the assignment, *Price* v. *Helyar*, where the sheriff had not only levied but paid the money to the execution-creditors more than six weeks before any commission issued, and *Dillon* v. *Langley*, are certainly authorities to support the decision in *Potter* v. *Starkie*: but, as in them, as in *Potter* v. *Starkie*, the earlier cases of *Bailey* v. *Bunning*, *Lechmere* v. *Thorogood*, *Cole* v. *Davies*, and *Aldridge* v. *Ireland*, 1 Taunt. 273, were never mentioned, since no distinction was presented to the court in either of them between the sheriff and the execution-creditor, but the determinations in all of them appear to have proceeded upon the erroneous view that was taken in the case of *Cooper* v. *Chitty*, I cannot allow them to have that weight, which a deliberate consideration of the cases that preceded *Cooper* v. *Chitty*, would have given them. As, therefore, I find nothing to take this question out of the rule that guided the courts in their decisions of the three cases that preceded that of *Cooper* v. *Chitty*, in respect to the liability of a sheriff as being the mere minister of the law; and, as I am irresistibly led by many of the observations in the judgment of Lord Mansfield in *Cooper* v. *Chitty* to believe that the same rule was recognized by him in deciding that case, and that he never meant to extend the liability of a sheriff to the alarming length to which the later cases have carried it; I feel myself justified in answering the first question proposed by your lordships in the negative.

Third question.

It follows, of course, from the view I have taken of the first question, that my answer to the third must be in the

1837.

GARLAND v. CARLISLE.

negative; it not appearing to me that the liability of the sheriff is at all altered by his concurring in an arrangement between the plaintiff and the defendant, and receiving his poundage, instead of selling the goods and entitling himself thereto, as he would in either case be only receiving the remuneration allowed by law. Because I apprehend, that, if goods are rightly seized under a writ of fi. fa., being the property of the defendant, and the sheriff being bound to sell them for the benefit of the plaintiff if required, he is at full liberty, by desire of the plaintiff and defendant, to abstain from selling, and may acquiesce in any arrangement which the parties chuse to make. Neither of those parties could call him to account for having acted according to their joint desire: and by the hypothesis no other person has anything to do with the goods at the time when they are so disposed of. If the sheriff be excusable at all, he must, I think, be placed in the same situation as if no question of bankruptcy had arisen.

First question.

PARKE, B.—To the first question proposed by your lordships, I answer, that, in my opinion, the sheriff is liable, under the circumstances stated, to an action of trover. For the last thirty years at least I believe much longer) it has been considered to be an established rule of law that the sheriff was answerable in an action of trover, though not in an action of trespass; the latter form requiring possession by the plaintiff at the time of the trespass committed. It was decided that the action of trover lies, in the cases of *Potter* v. *Starkie*, 4 M. & Sel. 260, *Lazarus* v. *Waithman*, 5 Moore, 318, *Price* v. *Helyar*, 1 M. & P. 541, 4 Bing. 597, and *Dillon* v. *Langley*, 2 B. & Ad. 131. In *Wyatt* v. *Bludes*, 3 Camp. 396, the point appears to have been taken for granted by Lord Ellenborough and the bar: and it has found its way into the text books—Cooke's Bankrupt Law, Bacon's Abridgment (Gwill. Ed. 1798)—

1837.

GARLAND v. CARLISLE.

and, speaking for myself, I may say, that, since I was a member of the profession, no point of bankrupt law was deemed to be more entirely at rest than this. I venture, therefore, humbly to suggest to your lordships that this doctrine, established by a modern practice of so long standing, ought not now to be disturbed, on the authority of two cases (for, there are really no more—*one* only in banc), and those not very clear. It is true, that no titles depend upon this rule; and that no interests in property will be brought into question by departing from it. But our system of law depends upon precedent and authority, and the evil is only greater *in degree* in cases where titles are shaken: it is an evil in all, and tends to produce uncertainty and confusion if we abandon established and recognized rules.

But, independently of all authority, I think that, upon the true construction of the bankrupt laws, on which the question altogether depends, the sheriff is responsible. I will state the reasons for that opinion as shortly as the nature of the case will permit: and I am afraid that I must of necessity travel over a part of the same ground which I have already done at greater length in the court below.

Is the effect of the statutory assignment to transfer the property, at the date of the act of bankruptcy, as to the sheriff and other ministerial officers of the same character, or is it not? That is the whole question. If it is, the sheriff must be liable; if not, he is excused. I cannot help thinking that the common law doctrines, on which so much reliance has been placed in the judgments of some of the learned judges in the court below, as to *relations*, has no bearing on this question at all. The maxims (3 Rep. 26 and 29) that "no relation shall make that tortious which was lawful," and that "relations are fictions of law, which shall never do wrong," apply only to fictions created by the common law for the purpose of doing *justice*, and which are qualified for the like purpose. They

do not extend to relations created by the express provisions of an act of parliament, upon which the only question is one of construction merely—whether the relation *be* qualified or not. If the sheriff is not affected by the statutes, it must be on one of two grounds, either because their provisions do not, in their terms, comprise that officer, or because if they do, he is, either expressly by some other cause, or impliedly, from the purview of the act, or on some general principle of expediency or justice, exempted from their operation.

First, I propose to examine the clauses of the bankrupt statutes, to see whether they include such an officer or not. The first statute, 34 & 35 Hen. 8, c. 4, appears to give no retrospective operation to the sale of the bankrupt's lands or goods. The important statute is, the 13 Eliz. c. 7, which impowers the Lord Chancellor to grant a commission, and the commissioners to take by their discretion such order and directions, as well with the body of the offender as also with all his lands, &c., and also with his money, goods, chattels, wares, merchandizes, and debts; and by deed indented and inrolled, &c., to make sale of the lands belonging to the bankrupt, freehold and copyhold, and also of fees &c., goods, and chattels, or otherwise to order the same for the true satisfaction and payment of the creditors, rate and rate alike, according to the quantity of their debts: and the section then proceeds to enact that every direction, order, bargain, sale, &c., shall be good and effectual in the law for all intents, constructions, and purposes, against the said offender or debtor, his wife, heir or heirs, child or children, &c., and against all other person or persons claiming by, from, or under such offender or debtor, *by any act or acts had, made, or done after any such person shall become bankrupt* as is aforesaid, and also against lords of manors whereof such copyhold lands were holden, their heirs, successors, and assigns. The 21 Jac. 1, c. 19, s. 9, "for

1837.

GARLAND v. CARLISLE.

the better distribution of the lands, goods, chattels, &c., of the bankrupt to and amongst his creditors," enacts (inter alia) "that all and every creditor having security for his debt, by judgment, statute, recognizance, specialty, or having made attachments in London, &c., of the goods and chattels of any such bankrupt, whereof there is no execution or extent served or executed upon any of the lands &c. and goods of such bankrupt, before such time as he shall or do become such bankrupt, shall not be relieved upon any such judgment &c. for more than a rateable part of their just and due debts, with the other creditors of the bankrupt, without respect to any penalty or greater sum contained in any such judgment &c. The 4 Anne, c. 4, s. 8, first mentions the assignees of the commissioners; and the 5 Anne, c. 22, s. 4, first directs a meeting to be held by the creditors for the choice of assignees. Until the time of the passing of one of these statutes, the effects of the bankrupt were assigned to different creditors, and not to general assignees, for the benefit of all. It is unnecessary to notice the subsequent acts of parliament. The question seems to me to turn upon the construction of the 13 Eliz. c. 7, and 21 Jac. 1, c. 19, which former statute is by the express provision of the latter to be "in all things largely and beneficially construed and expounded for the aid, help, and relief of the creditors."

It is contended, on the part of the sheriff, that he is not affected by the retrospective clause, because he does not claim "by, from, or under such offender, by any act had, made, or done after he became bankrupt." But it appears to me that the sheriff, who has a right to take only such interest as the bankrupt has, by virtue of the judgment and execution against him, does claim "by or under" him; not, indeed, by a voluntary act or conveyance by the bankrupt, but still by an act done after the bankruptcy; for, the teste or the issuing of the writ, which,

1837.

GARLAND v. CARLISLE.

as the law then stood, would, if this statute had not passed, have given to the sheriff a right to seize goods, as against subsequent purchasers, was undoubtedly "an act done." The clause, it is to be observed, says nothing as to the act being voluntary or being the act of the bankrupt himself. I will put a supposed case, which makes the point clear. A lease is made by the owner of a chattel, and there is a covenant for quiet enjoyment in that lease against all claiming by, from, or under the lessor, by any act or acts had, made, or done; the sheriff seizes and sells the chattel under an execution against the lessor, tested and delivered to the sheriff before the lease: would not this be a breach of the covenant? Of this there seems to be no doubt. And, besides, if the *sheriff* does not claim by or under the debtor, the execution-creditor certainly *does not;* he claims no more than the proceeds of the execution; and the assignment would not be good against him even if he seized under a writ tested after the act of bankruptcy; which is a point that has never for a moment been contended. Further, if the sheriff be not a person claiming under the bankrupt, it must be wholly immaterial whether he have notice of the act of bankruptcy, or even of the commission, or not: he cannot possibly be a person so claiming, because he has notice of either or both those facts, if he is not without; and, therefore, if the construction contended for by the plaintiff in error is put on the words of the statute, it follows that the sheriff would not be liable if he seized the goods of the bankrupt with full knowledge both of the bankruptcy and commission—a proposition which was not insisted upon in the prior arguments on this subject; and, on the contrary, it was distinctly admitted that he must be liable in such a case, in the judgment of the court of Exchequer in *Balme* v. *Hutton*. It is clear, however, that notice to the sheriff cannot make any difference in this respect; and it was so admitted at your lordships' bar. It seems to me, therefore,

1837.

GARLAND v. CARLISLE.

that the sheriff, if he had seized and sold under a writ tested and issued after an act of bankruptcy, would not have been protected, upon the proper construction of the statute. The 21 Jac. 1, c. 19, prevents a creditor from having any lien on the land of the bankrupt by a judgment obtained, or on his goods by a fi. fa. tested or issued, before the bankruptcy; which but for that provision he would have had; inasmuch as the creditor to whom the commissioners make assignments, are in the situation of subsequent purchasers. This statute prohibits the commissioners from giving to such person more than a rateable part, in the same way as to the other creditors, that is, the lands, notwithstanding such judgments, and the goods, notwithstanding such writs of fi. fa., were to be assigned proportionably to each creditor, like the bankrupt's other goods; and, consequently, since that statute, the sheriff could not have seized, after an act of bankruptcy, any goods of the bankrupt, under a writ tested or issued before the act of bankruptcy. Since the statute of 5 Anne, if not since the 4th, the commissioners have had the same power of assigning to the general assignees, that they had before of assigning to individual creditors: and the sheriff has no power to seize any of the effects so assigned, after the act of bankruptcy, under a writ, whenever tested, issued, or delivered to him. The provisions, therefore, of the statute of Elizabeth, in my judgment, affect the sheriff as well as all other persons claiming title to the bankrupt's goods, either by contract with or assignment from the bankrupt, or by operation of law; and the same relation which is given by the first statute is no doubt continued by all those which follow, and by the existing law.

I now proceed to the second question—whether the case of the sheriff is in any way excepted from the operation of the statutes which give this relation. It is certainly no where expressly excepted; and, if the exception

exist, it must be implied. On what ground is such implication to be made? Not because it is necessary, in order to carry into full effect the intention of the legislature; for, to hold the sheriff liable, is clearly in furtherance of that intention: it is better for the creditors; it secures more completely the even distribution of the bankrupt's effects, by extending the remedy for the recovery of his goods. The only ground, therefore, on which such an implication can be raised, is, that of general justice and expedience, on account of the hardship on the sheriff. But a mere hardship on a particular individual is not unreasonable, where it is for securing a benefit to a large class: and the case of the sheriff differs only in degree from that of others who suffer most severely by the retrospective operation of the law. A sheriff, indeed, is not a volunteer; that is *the only distinction*: he is bound to execute the process of the court; and he is liable to an action, even though he may know that the defendant is a trader, and has committed an act of bankruptcy, and that a commission has issued; and the damage *may*, it by no means follows that it *must*, equal the amount of the debt. In other respects, he is on the same footing with all others who intermeddle with the bankrupt's property; none of whom, it is admitted, are exempt. On the other hand, if the sheriff is liable in this form of action, and is obliged to pay to the assignees, he is to a certain extent indemnified, by the right which he has to recover back the money paid to the execution-creditor. The truth, however, is, that these implied exceptions are an usurpation of the province of the legislature. The object of creating the relation, was, to secure the even distribution of the bankrupt's effects: for that purpose, all mesne acts were defeated, though at the expense of much hardship to individuals. Where that hardship has operated too severely, the legislature have qualified the relation; and the best course, and the most consistent with

1837.

GARLAND v. CARLISLE.

the province of judges, is, to leave the legislature to alter it in the case of sheriffs, rather than, by creating the exception ourselves, to violate the principle on which our decisions ought to proceed, and which is, that we should declare and not enact the law.

There is one case, indeed, in which the courts are said, in the argument at your lordships' bar, to have introduced an exception to the retrospective operation of the statutes, that is, where a bankrupt has sued before assignment for a debt due to him, and recovered it, and obtained payment; the debtor has been held not to be liable to the assignees. The earliest of these cases is, *Pris* v. *Beal*, 3 Keb. 231. That of *Foster* v. *Allanson*, 2 T. R. 479, is to the same effect. And it is quite certain that it is universally received as the law, and I believe in practice constantly acted upon, and ought not by any means now to be disturbed. I do not, however, say that this is an exception which the courts have introduced: they may have proceeded on the necessary implication arising from the enactment of the statute of 1 Jac. I, c. 15, which first makes debts due to or for the benefit of the bankrupt assignable by the commissioners. By this statute it is enacted, "that, *after* the grant, assignment, or disposition of the debts, neither the bankrupt nor any other to whom such debt shall be due, *shall have power to recover the same*, or to make any release or discharge thereof:" with a proviso "that no debtor of the bankrupt be endangered by payment of his debt truly and bonâ fide to any such bankrupt before such time as he shall understand or know that he is a bankrupt." The proviso has been held to apply to voluntary payments only; and, under the other provisions of the act, if the bankrupt cannot recover *after* the assignment, it seems to follow that he may *before*: and, if he is entitled to recover, his recovery must be complete, and must discharge the debtor. Be that as it may, the proposition that the debtor cannot be again

1837.

GARLAND v. CARLISLE.

called upon to pay after the debt has been recovered, has been so long established as law, that it cannot now be doubted: and I am by no means prepared to say, that, if the implied exception of the sheriff, in the case put by your lordships, were equally well established, I should not have fully acquiesced in it. But all modern practice and opinion is unquestionably, with regard to this exception, the other way: and I think it would be a deviation from established principle now to introduce it.

Second question.

To the second question proposed by your lordships, I answer, that, in the case supposed, the sheriff is in my opinion liable. I have some doubt whether the simple act of *seizing* the goods would make the sheriff liable in a case of this nature, where the seizure would not be a *trespass*. The case of *Bailey* v. *Bunning*, so often referred to, was, I conceive, decided on that ground: but, if, after seizure, instead of abandoning the possession, the sheriff *permits* any others to take or dispose of the goods, I think that is an act of conversion of the goods, as much as if he had so dealt with them himself: and it is so, if he permits the plaintiff and defendant so to dispose of the goods as that the sheriff would thereby be entitled to poundage in the same way as if he had himself sold and levied the debt. Such a disposition I understand to be one by which the plaintiff receives the goods themselves, or is allowed by the sheriff, by himself or some other, to sell them in satisfaction of his debt.

Third question.

The third question proposed by your lordships is only in the event of the first being answered in the negative: and, as I have already given an affirmative answer to the first, I presume that it is unnecessary for me to say any thing upon this question. If I am to give an opinion, I will say shortly that I agree with my brother Bosanquet, that, if the sheriff is protected *when he acts in obedience to the writ*, because he does his duty, he is not so in the case supposed; for, a delivery of goods to the execution-

1837.

GARLAND v. CARLISLE.

creditor is irregular, unless with the consent of the plaintiff and defendant; and the defendant was incapable of consenting, by reason of the relation of the act of bankruptcy.

VAUGHAN, J.—Finding myself, after mature consideration, unable to reconcile my mind to the opinion of the great majority of my learned Brothers from whom it is my misfortune to differ, I feel it my duty to state, within as short a compass as I am able, the reasons which have brought me to the conclusion that the judgment of the court below ought to be reversed. The first and leading question which your lordships have been pleased to propound to us, and to which I shall immediately address myself, involves an important principle as it regards the duty and conduct of the sheriff, a public officer and minister of the law, viz. whether a sheriff seizing and selling goods under a fi. fa. was in December, 1824, liable in an action of trover brought by the assignees of the defendant in the action in which the fi. fa. was issued, such defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after the sale. To this question I answer in the negative, that, in my humble judgment, the sheriff is not liable. But, before I proceed to state the grounds of my opinion, I would take leave to advert to the fact stated in the special verdict—that, until the issuing of the commission, the sheriff was ignorant that any act of bankruptcy had been committed. At the same time, I am free to acknowledge, that, according to my view of the question, the rule of law will be the same whether the sheriff had or had not notice of the bankruptcy. I mention this circumstance, because the counsel for the defendant in error, when arguing the case at your lordships' bar, observed that Lord Lyndhurst, when delivering the udgment of the court of Exchequer in the case of *Balme*

First question.

v. *Hutton* (in which I concurred, having at that time the honor of a seat in that court), remarked *pointedly* on the fact of the sheriff having no knowledge that an act of bankruptcy had in that case been committed. I have thought it material to notice this circumstance, not as being essential to the support of my opinion, because I conceive the sheriff's claim to be exempted from all responsibility does not depend upon the question whether he was ignorant or cognizant of the act of bankruptcy, but upon his imperative duty and obligation to execute the writ.

For the plaintiff in error, it has been argued, that, the sheriff, being a public officer and servant of the law, and in that character *compelled* to do the act complained of, cannot be deemed liable to this action, notwithstanding the bankrupt laws vest by relation all the property of the bankrupt in his assignees from the moment of the bankruptcy; that, if there be any legislative enactment the words of which are sufficiently large to include the sheriff, yet an *exception* would be *implied* (if not expressed) in his favor, arising out of his official character and duty; that there are many judicial decisions of weight and authority which recognize and confirm this exception. For the defendant in error it has been argued that the sheriff, not being *expressly excepted*, must be considered as falling within the ordinary meaning and plain grammatical construction of the acts of parliament referred to, unless at variance with the intention of the legislature, to be collected from the statutes themselves; that the construction contended for by the defendant in error (independently of the case of *Cooper* v. *Chitty*) is confirmed by one uniform series of decisions for a period at the least of the last thirty years, with the solitary exception of *Balme* v. *Hutton*, decided in the court of Exchequer, but since over-ruled by a large majority of the judges in the court of Exchequer Chamber.

1837.

GARLAND v. CARLISLE.

Whether the plaintiff or defendant in error has established the strongest claim to your lordships' judgment, as the court of dernier resort, is the question to be examined. And, first, with respect to the position contended for by the defendant in error, that, upon the plain and true construction of the *statute* law, the sheriff is liable. For, I admit, that, if there be any clear legislative enactment upon the subject, cadet questio. The first question imports that the conversion which constitutes the cause of action, preceded the operation of the act of 6 Geo. 4, c. 16, which has incorporated and consolidated into one general statute all the provisions thought necessary in the due administration of the bankrupt laws. The case, therefore, must be considered with reference to the statutes at that time unrepealed. And, in commenting upon those statutes, great stress was laid upon the 13 Eliz. c. 7, s. 2, and the 21 Jac. 1, c. 19, s. 12, as creating an *express* liability in the sheriff. The object of the 13 Eliz. c. 7, s. 2, was, to give to the commissioners a controling power, not only over the body of the debtor, and over his personal goods and chattels, but also "over such lands as the bankrupt had in his own right before his bankruptcy, and all such lands as he might have purchased jointly with his wife, children, or child, to his only use, or to such use as he might have in the same, which he might lawfully depart withal, or with any person of trust to any secret use of such debtor; and to make sale of them, and to divide them rate and rate alike amongst the creditors." In furtherance of this declared object, it proceeded to enact that every direction, order, bargain, sale, &c., should be good and effectual in law for all intents, constructions, and purposes, "against the said debtor, his wife, heir or heirs, child or children, or such persons as by such joint purchase with the offender shall have any estate or interest in the premises, and against *all other person or persons claiming by, from, or under such offender or debtor, by*

1837.

GARLAND v. CARLISLE.

any act or acts had, made, or done after any such person shall have become bankrupt, and also against lords of manors whereof such copyholds were holden, their heirs," &c. A careful attention to the words in the prior part of that section, and to the general context of the whole, leads my mind to the opinion, that, by the expressions " and all other persons *claiming by, from, or under such debtor by any act or acts done after the bankruptcy*," the legislature did not intend to include the sheriff, who makes no claim for his own benefit; but to designate the relations of the bankrupt, whether his wife or children, and all other persons to whom property had been conveyed jointly with him, or any other persons holding them in trust to any secret use for him. It seems intended to remedy a practice probably at that time, and indeed at all times, prevalent with traders in failing circumstances, of conveying away property to secret uses after an act of bankruptcy committed by them. Confining my attention to that clause alone, I am inclined to adopt this construction: but my opinion is confirmed by comparing it with the 1 Jac. 1, c. 15, s. 5, which, being made in pari materiâ, passed for the purpose of defeating conveyances made by a bankrupt of any real or personal property, unless made on the marriage of his children (all parties being of years of consent), or on some valuable consideration, gives to the commissioners power to dispose of the same in as ample manner as if the bankrupt was actually seised or possessed to his own use at the time of his bankruptcy; and enacts that the grant, conveyance, or disposition of the commissioners shall be good and available to all intents, constructions, and purposes in the law, " against the bankrupt, his heirs, executors, administrators, and assigns, *and such* children and persons as are subject to this statute, and against all other persons *claiming* by, from, or under such offender, or such said other *persons*

1837.

GARLAND v. CARLISLE.

to whom such conveyance shall be made by the said bankrupt, or by his means or procurement."

If the construction of the 13 Eliz., c. 7, s. 2, were obscure, this 5th section appears to me to reflect so clear a light upon it as to shew distinctly, that, by the terms *persons claiming*, were meant persons claiming under a grant or conveyance from the bankrupt, or under some other person to whom the bankrupt had previously conveyed. The only difference between the one enactment and the other, is, that, in the statute of Eliz., you have the words *claiming*, by, from, or under the bankrupt by *any act or acts done* after the bankruptcy; whereas, in the 1 Jac. 1, c. 15, s. 5, you have the words "*claiming by, from, or under* the bankrupt, *or* such other persons to whom such *conveyance* shall be made by the bankrupt, or by his *means or procurement.*" The words of the section in the latter act "or such other persons to whom such conveyance shall be made by such bankrupt, or by his means or procurement," although of similar import, seem more comprehensive even than the words of the statute of Elizabeth, "by any act or acts had, made, or done;" and expressly refer to a *claimant* by, from, or under the bankrupt, *through the medium of a conveyance.* If further aid were yet wanting to the true construction of the 2nd section of the 13 Eliz., I think it may be derived from recourse to the language employed in the 21 Jac. 1, c. 19, s. 12, which has been so often referred to by those who insist that the sheriff's liability is created by express legislative enactment. The earlier part of that section points to the mischief resulting from bankrupt tenants in tail cutting off the entail after an act of bankruptcy committed by them, and therefore gives power to the commissioners to grant and convey the entailed lands of the bankrupt, and makes such grants and conveyances good and available in law to such persons and their heirs, and every the issues of the body of the bankrupts, and every person *claiming any*

estate, right, title, or interest by, from, or under the bankrupt, after such time as he shall become bankrupt, and against every person whom the bankrupt by common recovery or other ways or means might cut off or debar from any remainder or reversion. I make no comment upon the section of the 21 Jac. 1, which deprives the judgment creditor of his priority or preference, because I do not think it bears directly upon the point in question; and, looking at the object and purpose for which they were introduced, it cannot I think be doubted that it was the clear intention of the legislature to defeat every attempt by a trader, after an act of bankruptcy committed, to dispose of his property, whether by grant, conveyance, or any other act done by him or by his means or procurement. But I find no expressions the sense of which imports that the act of the sheriff in enforcing the judgment of a creditor through the medium of a fi. fa., was in the contemplation of the legislature.

After comparing the three clauses of these several acts of parliament with each other, for the purpose of ascertaining the true meaning of the expressions found in each, viz. of persons *claiming by, from, or under the bankrupt,* I ask in what sense of the word can the sheriff be regarded as a claimant? He asserts no right of property; he claims no personal interest or benefit: but merely acts ministerially, as the servant and officer of the court which commands him to execute its process. He is directed to levy of the goods and chattels of the bankrupt the sum mentioned in the writ. He is employed only as the conduit-pipe to convey the proceeds of the levy into the pocket of the execution-creditor. He has no discretion to exercise being imperatively bound to seize them, unless a commission has issued, followed by an assignment. His neglect or refusal is an act of disobedience punishable by the law. If he returns nulla bona, he is liable to an action for a *false* return; which proves that the goods *at*

1837.

GARLAND v. CARLISLE.

the time of the seizure were the bankrupt's property. If he levies and pays the judgment-creditor, he becomes liable to the assignees under a commission subsequently issued.

I agree that all the statutes relating to bankrupts are to be taken as one connected series; that they are to be liberally and beneficially expounded (they are required to be so by the 21 Jac. 1, c. 19); that the doctrine of relation was wisely introduced, to prevent fraud, and to effectuate the great purpose of an equal distribution amongst the creditors. It has been argued that the doctrine of relation must of necessity be attended with hardship to individuals; but that the policy of the law sanctions it: and Lord Hardwicke, in *Billon* v. *Hyde*, justifies the application of it to the bankrupt laws, upon the principle that it is better that a private mischief shall be endured, than a public inconvenience. I feel and acknowledge the force of his lordship's reasoning upon the subject: but I have yet to learn that the efficacy of this salutary principle would be impaired by recognising an exception in favour of the sheriff. Payments by and to traders, made bonâ fide and without any knowledge of an act of bankruptcy, have been adduced as instances to shew, that, until the legislature was inclined to interfere, from the crying injustice inflicted by the operation of this doctrine of relation on private individuals, they suffered the same hardships as the sheriff may now do. It appears to me that the arguments founded upon the hardship of the case, bear with infinitely more force upon the sheriff than upon any private individual. Private individuals are under no *obligation* to intermeddle with the property of the bankrupt: and, if they interfere, they do it at the peril of being responsible. But the sheriff exposes himself to punishment if he refuses to execute the writ, and, if he executes it, to an action in which damages may be recovered against him to the full value of the property, although he may

1837.

GARLAND v. CARLISLE.

have conducted himself with diligence, integrity, and good faith in the discharge of his official duty.

Being, therefore, of opinion that there is no legislative enactment by which the sheriff is rendered expressly liable; but assuming, for the sake of argument, that the general terms in which the clauses to which I have referred are expressed, may be thought so large as to be of *universal* application, and consequently to comprehend the sheriff, I think, for the reasons I have stated, that the law would imply an exception in his favour, arising out of his official character and duty, being an officer of justice, *compelled* by stern necessity to execute the king's writ. "Necessitas quidquid coegit defendit." I now proceed to observe on the judicial determinations applicable to this subject, with a view of shewing that our courts of law have recognized and established this exception in the sheriff's favour, in a series of cases from very early times. The cases have of late years so often passed in review before the judges of every court in Westminster Hall, the facts have been so frequently and fully stated and commented upon at your lordships' bar, that it is with reluctance I enter upon any elaborate investigation of them. The first case in order of time was *Turner* v. *Felgate*, 2 Sid. 126, 1 Lev. 95. It was decided during the Commonwealth—an action of trespass against a man who had recovered a judgment against the plaintiff, which was afterwards reversed: the judgment was arrested, and restitution awarded; and trespass was brought against the sheriff, and against the *party* who went with the sheriff to shew him the goods. It was resolved that the party who went with the sheriff was liable: but the court agreed that *the sheriff, being an officer of justice, was not suable or chargeable.* Keeling, C. J., held, that trespass would lie against the *party*, but added, *the case is otherwise against an officer, as here, to whom relation shall work no wrong.* In the report of the same case in 1 Lev. 95, I find this ob-

1837.

GARLAND v. CARLISLE.

servation—"Note the difference between charging an officer and charging the party; for, in *Bailey* v. *Bunning*, case hereafter, 'tis held, that the *officer* should not be charged, where perhaps the party will be chargeable." This case of *Turner* v. *Felgate* was afterwards relied upon in *Bailey* v. *Bunning*, in 17 Car. 2, reported in 1 Lev. 173, 2 Sid. 271, 2 Keb. 32. In these several reports there is a perfect accordance in the statement of facts and in the precise point on which the judgment of the court was pronounced. It was an action of trover, and an objection was taken to the form of the special verdict, as not finding a *conversion*, but stating only a demand and refusal. It appears, however, that the case was adjudged upon the single point mentioned by every Reporter, viz. "that the sheriff, being an officer, was obliged to execute the writ, and could not know of the act of bankruptcy, or whether any commission would ever be sued out"—2 Lev. 174. In *Lechmere* v. *Thorogood*, 1 Show. 12, the same distinction was recognized. It was trespass by the assignees against the sheriffs of London, and against the execution-creditor. Upon the second argument, Sir B. Shower says: "I now argued it again upon this point, that, although by the statute of bankrupts the property of the goods be vested in the assignees, *yet this relation should not work a wrong*, to make *the officers* trespassers, who have a good authority, and took the goods lawfully; and so is the case of *Bailey* v. *Bunning*. And the court was clear that the verdict was against the plaintiff, and that *this* action lay not against the officers, though trover would *against the party*." Surely the language of this judgment is pregnant with the conclusion, not only that *trespass* would not lie against the officers, but that it would not lie against the party; and *trover* would not lie against the officers, although it would against the party. It is not an immaterial circumstance that Lord Holt was Chief Justice of the King's Bench when he decided this case, in conjunction with Dobbin, in the first

1837.

GARLAND v. CARLISLE.

year of the reign of William & Mary; and the principle of which he afterwards sanctioned and confirmed in the 10th year of William 3, when trying the case of *Cole* v. *Davies*, at Nisi Prius, in Guildhall, in which he held, under similar circumstances, that the assignees might maintain trover against the *vendee* of the goods, but no action would lie against the sheriff—*because he obeyed the writ.* Comberbach, in reporting the same case (p. 123), observes that the consideration of it was adjourned, and that afterwards the court were of opinion that a construction should not be made to make an officer a trespasser by relation; for, the taking was lawful at the time; and *Bailey* and *Bunning's* case, in Siderfin, agrees—decided per Holt and Dobbin. *Phillips* v. *Thompson*, 3 Lev. 192, confirms the same doctrine, where it was held that *Bailey* v. *Bunning* was resolved only in excuse of the sheriff—"that he should be excused for executing the writ, and not that the goods were bound by the delivery of the writ." In addition to the authorities, which in my judgment are very strong to shew that the law will interpose its shield to protect its officers and ministers of justice in the discharge of their duty, I would mention also the case of *Smith* v. *Milles*, 7 T. R. 480. The question there was, whether the sheriff, who had seized the goods of a trader under a fi. fa. after a secret act of bankruptcy, and sold them after a commission, but before the assignment, could be considered a *trespasser* by relation. The authority of the case of *Cooper* v. *Chitty* was relied upon as conclusive upon that point: and Ashhurst, J., who delivered the judgment of the court, in the presence of Buller, J., after stating the principle upon which their decision was founded, viz. that, where a man who has a new right given to him which from reasons of policy is made to *relate back* so as to avoid all mesne incumbrances, he shall not be taken to have such a possession as will entitle him to bring trespass for an act done before such right was given to him. He adds: "At all events,

1837.

GARLAND v. CARLISLE.

the rule will hold with respect to officers and ministers of justice." The last case, but not the least entitled to the most serious attention from your lordships, from the clear and succinct way in which it is reported, in favour of the doctrine contended for by the plaintiff in error, is *Cole* v. *Davies*, 1 Lord Raym. 723. It contains a great variety of points, which the Reporter has embodied in four distinct resolutions. The first alone bears directly upon and decides the main question. A. bankrupt before seizure, the sheriff under a fi. fa. seizes the goods and sells them, and a commission is granted, and the goods assigned by the commissioners: the assignees may maintain trover against the vendee of the goods; but no action will lie against the sheriff, because he obeyed the writ. Lord Mansfield, in commenting upon this case, observes that Lord Raymond was a very young man when this note was taken, and that its accuracy cannot be relied on: and he adds—" Besides, the case there put is of a sale by the sheriff *before* the commission, and the conversion might be as excusable as the taking, because he obeyed the writ; whereas *here* the goods were not sold until *after* both the *commission and assignment.* It is a loose note of what is said obiter. It manifestly refers to *Bailey* v. *Bunning*, but is no authority applicable to the present case." I confess the report, on the face of it, bears internal evidence of the correctness and fidelity with which it was taken. I think it probable it underwent much discussion at the time; and it should be remembered that Lord Holt, who decided it in 10 Will. 3, had in the first year of the same reign delivered the judgment in *Lechmere* v. *Thorogood*, and, according to the report of this case in Comberbach, cited *Bailey* v. *Bunning* from Siderfin; whence I infer that it was the result of his mature judgment, after much rumination and reflection.

Having endeavoured to shew, from this gradual accumulation of authority, that, before the reign of Charles

1837.

GARLAND v. CARLISLE.

the Second, and from that time until the case of *Smith* v. *Milles*, an exception in favour of officers and ministers of justice had been invariably recognised, I shall now advert to those decisions which lead to a contrary conclusion. And here I must confess, that, for a period of about thirty years, the current ran in one uniform direction against the sheriff. *Potter* v. *Starkie*, 4 M. & S. 260, *Lazarus* v. *Waithman*, 5 B. Moore, 313, *Price* v. *Helyar*, 1 M. & P. 541, 4 Bing. 597, *Wyatt* v. *Blades*, 3 Camp. 396, *Dillon* v. *Langley*, 2 B. & Ad. 131, are cases decided by very eminent judges sitting at Nisi Prius, and some of them afterwards confirmed by the judgment of the court from which those records issued; and, therefore, have been received by the profession with the respect and attention due to such authority. At the same time, it cannot be disguised that they are in direct opposition to and conflict with the earlier decisions I have mentioned of *Turner* v *Felgate*, *Bailey* v. *Bunning*, *Lechmere* v. *Thorogood*, *Phillips* v. *Thompson*, and *Cole* v. *Davies*. Whoever has watched the progress of these cases through their several stages to their ultimate decision, cannot fail to ascribe them to a mis-apprehension of the judgment of the court of King's Bench, as delivered by Lord Mansfield in *Cooper* v. *Chitty*. I have not been able to persuade myself that *Cooper* v. *Chitty* forms any authority for the defendant in error in the present case. The seizure by the sheriff was after a secret act of bankruptcy; and the cases so far only have any resemblance to each other: but the sale did not take place until after the commission and assignment. Lord Mansfield, through the whole of his masterly judgment, relies upon this strong fact as conclusive against the sheriff; insisting that the sale, which was the wrongful conversion, was after the commission and assignment, both which were matters of public notoriety. In commenting on the cases of *Bailey* v. *Bunning* and *Phillips* v. *Thompson*, I do not observe that

1837.

GARLAND v. CARLISLE.

Lord Mansfield throws out the slightest insinuation against their authority. He observes, Lord Ken. 420: "Those cases determine that the taking the goods was lawful. But, how was the seizure lawful? Is it meant that it was lawful as against the assignees, or in any sense to change the property? *Clearly not*; for, the assignees will pursue and avoid every disposition, even in market overt. No more can be meant than this, that the sheriff, not knowing anything of the secret act of bankruptcy, or that any commission would ever be taken out, shall not be punished as a *wrongdoer* for the taking, which, though not lawful against the assignees, yet was *innocent and excusable*." It has, however, been argued, that, although the facts in *Cooper* v. *Chitty* differ materially from those of the present case, yet Lord Mansfield lays down a broad distinction between the liability of the sheriff in trespass and trover; and it is assumed, that, in a case circumstanced like the present, he would have held the sheriff liable; an inference which I do not think warranted either by the spirit or letter of that judgment. The expression reported to have been used by Lord Mansfield, that the sheriff cannot be made a trespasser by relation, has been tortured to mean that he may still be looked upon by the eye of the law as a *wrongdoer* in an action of *trover*. But to my mind it is evident, upon a careful comparison of the two reports of the judgment of Lord Mansfield in *Cooper* v. *Chitty*, by Sir James Burrow and by Lord Kenyon, that his lordship used the word "trespassers" because he was speaking of the *action of trespass*: but, when speaking of the act itself, in contradistinction to the form of action, I think he never intended to designate the sheriff as a wrongdoer so as to have incurred the guilt of a wrongful conversion—a construction at variance with the concluding sentence of his judgment as reported by Sir James Burrow, in these words: "The seizure here is after the bankruptcy, and therefore after the property by relation

is vested in the assignees. But that was *innocent and excusable;* and the sheriff shall not be liable *by relation* as a *wrongdoer.* The gist of this action is, the wrongful conversion by the sale and false return after the commission and assignment."

I have dwelt the longer upon the case of *Cooper* v. *Chitty,* because it has been used as the key-stone and foundation upon which the modern cases have rested the responsibility of the sheriff, and has been relied upon as entitling the plaintiff to judgment. All the dicta at Nisi Prius, and all the judgments in banc, profess to have been based upon the authority of that case. It is in my humble judgment no authority for any such position: and, if we confine our attention to the facts to which that judgment applied, and to the point actually determined, it was this, and this only, viz. that a sheriff who seizes after a secret act of bankruptcy, but before commission issued and assignment made, and sells after he has full knowledge both of the commission and assignment, is liable to be sued by the assignees in an action of trover. To the soundness of that judgment I cordially subscribe; but I cannot feel the correctness of the inferences which have been drawn, as I think unwarrantably, from some general expressions of Lord Mansfield, and which have been pushed to the extravagant extent of countenancing the doctrine, that, because by the *relation* created by the bankrupt laws the property becomes vested in the assignees from the moment an assignment is made, *therefore* the sheriff's act of seizure and sale *before* such commission and assignment constitutes him by relation a wrongdoer, and renders him liable in trover.

The first case in direct hostility to the sheriff is *Potter* v. *Starkie,* tried before Mr. Baron Wood in 1807, and brought under the notice of the court of Exchequer in Michaelmas Term in the same year. It is singular that there is no account of it in the printed reports of that

1837.

GARLAND v. CARLISLE.

time, although the rule of law involved in the decision was a most important one as affecting the duty and responsibility of sheriffs and the administration of the bankrupt laws. It seems to have dropped still-born into the professional world, although its birth was likely to have attracted the general attention of Westminster Hall. A very meagre note of it is appended to the case of *Stephens* v. *Elwall*, 4 M. & Sel. 260, published many years after it was decided. All that is reported of it is, that the sheriff was held liable in trover, although he seized, sold, and paid over the money *before* the commission issued, and before any notice of the bankruptcy: the court saying—"this necessarily followed from *Cooper* v. *Chitty*; for, it was an unlawful interference with another man's goods." I confess it is difficult to conceive how this can be regarded as a necessary inference from *Cooper* v. *Chitty*; Lord Mansfield having in that case expressly declared the seizure to be a lawful interference so as to excuse the sheriff, but not lawful so as to support the act or prevent the property being considered by relation as vested in the assignees from the moment of the bankruptcy. To this case of *Potter* v. *Starkie* succeeded *Lazarus* v. *Waithman*, tried before Dallas, C. J., in 1824, where it appeared that the fi. fa. was delivered to the sheriff on the 15th November, 1820, the goods sold on the 21st December, and the commission issued on the 6th January following. Cross, Serjeant, for the defendant, had called upon the Lord Chief Justice to nonsuit the plaintiff, insisting on the trial, that trover could not be maintained, the assignment not having been made until after the goods were actually sold by the sheriff, who could not by a fiction of law be made a wrong-doer by relation. When the rule nisi was moved for, praying that a nonsuit might be entered, on the objection taken at the trial, the court unanimously refused the rule: Dallas, C. J., and Park, J., declaring, that, if the objection were to prevail, they must overturn *Cooper* v. *Chitty*,

1837.

GARLAND v. CARLISLE.

First question.

which had decided that the property in the bankrupt's goods became by the assignment vested in his assignees by relation; and Burrough, J., broadly observed that the point had been settled before he entered Westminster Hall. Richardson, J., expressed himself in terms more guarded and qualified. He said—The law has been long since settled and has repeatedly occurred at Nisi Prius, viz. "If a sheriff takes a bankrupt's goods in execution after an act of bankruptcy, and before the commission, and sells them after it has issued, the assignees may bring an action of trover against him;" and concludes his judgment in these words: "Although the defendants might not have known that a commission was about to issue at the time of the seizure, it forms no excuse for them for having afterwards proceeded to a sale." Mr. Justice Richardson, therefore, if correctly reported, must have misconceived the material facts of the case (the seizure and the *sale* being both before the commission), or he laid down a rule of law altogether inapplicable to those facts. It is a circumstance not unworthy of remark, that, when *Lazarus* v. *Waithman* was before the court of Common Pleas, the case of *Potter* v. *Starkie* was never cited or referred to, although, as we have been informed by Mr. Justice Williams, it had been elaborately argued by that able lawyer and excellent judge, Sir John Richardson, in the court of Exchequer. The case of *Price* v. *Helyar* is undoubtedly an authority also in favour of the defendant in error, there being no fact in that case which places the sheriff in a more favourable position than the present plaintiff in error; and the court decided that he was liable in an action of trover brought by the assignees, for selling the effects of a trader under an execution after a secret act of bankruptcy, and before the commission issued. In delivering the judgment of the court, after much consideration, and after ascertaining from Sir John Richardson (who had been counsel in *Potter* v. *Starkie*) that the court

1837.

GARLAND v. CARLISLE.

of Exchequer had decided that case in the manner stated in the note to *Stephens* v. *Elwall*, 4 M. & S. 260, and gave the reason there assigned for their judgment, Lord Chief Justice Best says: "That case depended upon the previous decision in *Cooper* v. *Chitty*; and we think the case of *Cooper* v. *Chitty* embraces the principle upon which we now decide." His lordship then refers to the report of *Cooper* v. *Chitty* by Sir W. Blackstone, which he assumes (contrary, I believe, to the almost universally received opinion of the profession) to be the most correct account of Lord Mansfield's judgment, although at variance, not only with the reports both of Lord Kenyon and Sir James Burrow, but also at variance with what Sir W. Blackstone had himself reported to have fallen from the court in *Timbrell* v. *Mills*, in which he says: "The whole court declared it was allowed in *Cooper* v. *Chitty*, that, if the sheriff levies and pays the money over before commission issued, he is safe." In all these cases, to which may be added *Wyatt* v. *Blades* and *Dillon* v. *Langley*, as authorities in favour of the defendant in error, the judges profess to have squared their decisions by the rule laid down by Lord Mansfield in *Cooper* v. *Chitty*. But, in justice to the memory of that great man, I must observe that his masterly judgment cannot warrant the interpretation put upon it. I am aware, that, of late years, this has been a prevalent opinion in some of the superior courts of Westminster Hall; and it may be said "Communis error facit jus." But, unless I am tied and bound by the imperative language of an act of parliament, or by a series of authorities running in one clear and undisturbed current, I cannot prevail upon myself to subject a public officer to the injustice which such a decision must of necessity inflict upon him. It has been observed that the 6 Geo. 4, c. 16, s. 81, which enacts that "all executions and attachments against the goods of a bankrupt bonâ fide executed or levied more than two months before the issuing of the com-

mission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person at whose suit such execution or attachment shall have issued had no notice of any act of bankruptcy," has materially lessened the responsibility of the sheriff; and that the provisions of the late interpleader act, 1 & 2 Will. 4, c. 58, s. 6, which enables the sheriff to bring adverse claimants before the court, and compel them to litigate between themselves these controverted questions at their own peril, operate powerfully in his favour. It must be conceded that these enactments, which are of modern date, indicate an anxiety in the legislature to mitigate the severity of the law when found to bear oppressively on her ministerial officers: yet I apprehend they afford no solid argument for fixing on the sheriff a liability not warranted by any statute, nor in accordance with the spirit and principles of the common law. If it be asked, how could this opinion have prevailed for so many years, and have ripened into the authority of adjudged cases, unless built upon a solid foundation, I answer that it may have originated in hasty decisions at Nisi Prius, in which great judges have been misled by the popular treatises and publications of the day. In the early editions of Cooke's Bankrupt Laws, and so late as 1804, when the 5th edition appeared, the author of that treatise observes (in p. 595) " that the sheriff who executes a fi. fa. upon the bankrupt's goods *after* an act of bankruptcy committed and *before* the issuing of the commission, is not a *trespasser*, but the assignees may maintain *trover* against him." He then cites *Cooper* v. *Chitty*, *Smith* v. *Milles*, and *Cole* v. *Davies*: and adds: " It is true that formerly this seems to have been a litigated point, and much doubt was entertained upon the subject whether an officer executing the process of the courts, is not so far justified thereby as not to be subject to an action of any kind." In the edition of Bacon's Abridgment published in the year 1798, by Gwillim, tit. *Bankrupt* (F.), 1 Vol. 440,

1837.

GARLAND v. CARLISLE.

will be found the following note: "It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution *after* an act of bankruptcy, and before the issuing of the commission;" and for this doubt he cites *Bailey* v. *Bunning*, in Levinz, Siderfin and Keble; and he adds: "But it is now settled that the assignees may in such case bring trover against him (citing *Cooper* v. *Chitty*, 1 Bur. 20), though the relation shall not operate so as to make him a trespasser." This I conceive to be a very incorrect digest of the cases: and, if Gwillim or Cooke had referred to the edition of Lord Raymond published by Sir John Bayley in the year 1790, they might have corrected their own inaccurate analysis by the note of the learned editor to *Cole* v. *Davies*, 1 Lord Raym. 725, which supplies all the information which the cases then afforded, and distinguishes between the points ruled and the obiter dicta of the judges, with an accuracy and nice discrimination which marked every step of his laborious life, so many years devoted to the public service.

Having considered this question with the care and attention it requires, I think that the liability of the sheriff cannot reasonably be inferred from the nature of his office, and from the obligation and duties incident to it. I find no acts of parliament the true construction of which subjects him to such responsibility; and the cases decided upon the subject are at least conflicting. At all events, the question is left in so doubtful a state, that I feel myself at liberty to form such judgment as reason, justice, and public policy demand. These considerations incline me to the opinion, that, upon the main question proposed to us the judgment of the court below ought to be reversed.

Having taken this view of the case, it appears to me unnecessary to answer any other question.

First question.

LITTLEDALE, J.—It is admitted on all hands, that, so far as relates to the judgment-creditor (if he interferes in

1837.

GARLAND v. CARLISLE.

the sale, or receives the produce of the sale) and the vendee of the sheriff or other officer, the goods of the bankrupt are, upon the assignment to the assignees, vested in them by relation to the act of bankruptcy, so as to avoid all mesne assignments and dispositions, and that both upon the words of the various acts of parliament and the uniform construction that has been put upon the acts of parliament, and the policy of the bankrupt laws; and therefore I do not think it necessary to advert to any authorities as to the ground or effect of relations either at common law or by any acts of parliament.

The words of the acts of parliament are general, and make no exceptions as to the persons to be bound, only, indeed, that, as the king is not named in them, they do not affect the crown till there is an actual assignment of the property. But it is contended, on behalf of the defendant, that he is to be exempted from liability for seizing and selling, if he has no notice of an act of bankruptcy; and he contends this upon two grounds—first, that the older statutes of 34 & 35 Hen. 8, c. 4, 13 Eliz. c. 7, 1 Jac. c. 15, 21 Jac. 1, c. 19, 4 Anne, c. 4, 6 Anne, c. 22, and 5 Geo. 2, c. 30, do not extend to the sheriff at all; and that the last statute of 6 Geo. 4, c. 16, does not increase the liability of the sheriff. The statute of Hen. 8, says the sale by the commissioners shall be good and effectual against the bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty. The 13 Eliz. c. 7, s. 2, says the sale by the commissioners shall be good and effectual (and after an enumeration of various descriptions of persons) against all other persons claiming by, from, or under the bankrupt, by any act had, made, or done after he shall become bankrupt. The other acts of 1 Jac. 1, 21 Jac. 1, 4 Anne, 5 Anne, and 5 Geo. 2, as to the sale or assignment by the commissioners, all refer to the statute of Elizabeth; and no fresh powers are given to the commissioners, except

1837.

GARLAND v. CARLISLE.

that, by the statutes of Anne and of 5 Geo. 2, the commissioners are to assign to assignees, for the general benefit of the creditors who prove their debts. But I think that the words of the statute of Elizabeth are sufficient to bind the sheriff; for, though he does not claim as to any beneficial interest from the bankrupt, yet he claims to sell the bankrupt's property for the purpose of paying over the proceeds to the creditor of the bankrupt; and that I think quite sufficient, as far as the words of the act go, to bring him within the operation of the statute; and the more so as he has a remuneration in the shape of poundage for his trouble and such his liability.

The statute 6 Geo. 4, c. 16, need not be considered, because the transactions which give rise to the questions now under consideration took place before the statute passed.

But it is said the law will make an implied exception in favor of the sheriff or other person having the execution of process, because he is bound to obey the king's writ; and that it would be very hard to make him liable to an action when he acts according to the best of his judgment, and he has no means of ascertaining whether the debtor has or has not committed an act of bankruptcy. With regard to his being a public officer, and that he is bound to obey the king's writ—there is no doubt but he is, and in the execution of that duty he ought to be protected. But the question is, does he act in obedience to the king's writ? That commands him to take the goods of A.; but, how can they be said to take the goods of A., when A. himself has lost all title to them, and when the judgment-creditor has no right to treat them as the goods of A., and when the person to whom the sheriff might sell has no such right? The result, therefore, is, that, instead of seizing the goods of A., he seizes goods which by relation became the goods of the assignee.

But it may be said that they *are* the goods of A.; that

he has acquired them; that he is in possession, treats them as his own, and no other person has yet acquired a right to them. By the act of bankruptcy, however, there is a sort of stamp or mark put upon them, which, though invisible at first, is afterwards brought into light by the commission, and attaches upon them so as to destroy all property in the bankrupt; which destruction of property, though not apparent at the time of the levy, afterwards, when the commission and assignment take place, operate in the same way as if the whole had been known at once. He takes upon himself to sell goods which the judgment-creditor has no right to have sold for his benefit, and which the person who buys from the sheriff has no right to buy. How can this be acting in obedience to the king's writ?

As to the hardship upon the sheriff, the general policy of the bankrupt laws makes many things apparently hard. It is very hard upon a man who owes a trader money, and pays it to him bonâ fide, in the regular course of business, without any suspicion of an act of bankruptcy. So, also, it is hard if the bankrupt owes money which he pays to a creditor in the ordinary course of his business, he having no suspicion that an act of bankruptcy has been committed: and so, if a trader sells his estate after having committed a secret act of bankruptcy. Yet all these transactions are invalid by the general operation of the bankrupt laws; and it is only by several particular acts of parliament that these various things which I have mentioned are corrected or modified. It is a hardship on a sheriff if he seizes goods of which the debtor is in possession and the apparent owner, and it should turn out that the possession and apparent ownership was not fraudulent. No doubt, in such a case, the sheriff is liable; and yet the circumstances may be such as that the sheriff has no means of ascertaining the ownership.

I think the hardship of a case ought not to govern

1837.

GARLAND v. CARLISLE.

a principle on which the law should rest. Society is so framed that many persons fill situations which appear to induce great hardships: and, if it be of sufficient importance for the legislature to interfere, they will do so. The relation to the act of bankruptcy is made part of the law in order to prevent fraudulent transfers of property being made after the act of bankruptcy and before the commission. In carrying that into effect, some inconveniences and hardships occur which might have been provided for by some clauses in the great number of acts that have passed to remedy other hardships; and more particularly when the whole bankrupt law was remodelled and consolidated by the 6 Geo. 4, c. 16. But it was not so done, though it must have been very well known, from the variety of cases that have occurred, that it was at all events a question of doubt.

But it is said there is an exception to what would otherwise be the effect of the different acts of parliament in favour of persons who are compelled by legal proceedings going on to the extent of judgments, to pay debts due to the bankrupt after an act of bankruptcy committed. The statute 1 Jac. 1, c. 15, has only given the protection in cases of payments made to a bankrupt, which are so made without knowledge of an act of bankruptcy (*a*). But the law has made a further exception, that, notwithstanding such knowledge of an act of bankruptcy, if the debtor be compelled by legal process or judgment to pay, he shall be protected, unless the judgment be fraudulent or collusive (*b*). And it is therefore sought to be inferred that the law ought to create an exception in favour of persons who are compelled to execute legal process; more particularly if they have no notice of an act of

(*a*) And see 46 Geo. 3, c. 135, s. 1, 49 Geo. 3, c. 121, and 6 Geo. 4, c. 16, s. 82.

(*b*) See Prin v. Beal, 3 Keb. 231; Andrews v. Spicer, 3 Keb. 616; Foster v. Allanson, 2 T. R. 479; Prickett v. Down, 3 Camp. 131.

1837.

GARLAND v. CARLISLE.

bankruptcy. But I think the exception in the one case is no reason for it in the other. Where a bankrupt, who has committed an act of bankruptcy, sues his debtor, the debtor has no means of protecting himself against the action by reason of the act of bankruptcy; for, if he was to plead that the plaintiff was a trader within the description of the bankrupt laws, and had become indebted to another person in upwards of 100*l.*, and had afterwards committed an act of bankruptcy, that would be no plea; for, non constat that any commission would ever issue against him, and, if such a plea were allowed, a debtor might avoid paying his debt till such time as a commission issued, and consequently sometimes perhaps altogether. And therefore, if the law will not allow the debtor to protect himself by such a plea against a person who has committed an act of bankruptcy, it surely could never compel the debtor to pay the debt over again. But it does not follow, because legal process will create an exception in one case, that it is therefore to be extended, unless some satisfactory reason can be given for it; and the only reason appears to me to be, the hardship of the case, as to which I have before made my remarks.

But then the defendant says, that, by the construction which has been put upon the general administration of the bankrupt law, public officers in the station of having to execute process, are protected in cases circumstanced like the present; and that, though for a great number of years back, there are a great many decided cases, and though the practice while these cases have been recognized has been against sheriffs; yet these cases are contrary to law; and that the earlier cases were decided differently; and that these earlier cases being the first that occurred after the bankrupt law was introduced, are to be regarded as the existing law, not to be overturned by later decisions, and more particularly, as he says the whole of these modern cases and modern practice have been founded

1837.

GARLAND v. CARLISLE.

on a misapprehension of *Cooper* v. *Chitty*, reported in 1 Burr. 20, 1 W. Blac. 65, and 1 Ld. Ken. 395; and that, in all the late cases, the former decisions have not been properly brought before the court. It will, therefore, be proper to examine the facts and the principles of the decisions of some of them.

The earliest case urged on behalf of the defendant, *Bayley* v. *Bunning*, 1 Lev. 173, 1 Sid. 271, is an authority for the plaintiff in error; and the judges there say that the sheriff's taking was lawful, by virtue of the writ. But, in Siderfin, the reporter makes a quære; for, it was affirmed that the practice is, that the sheriff shall be found guilty if the party was then a bankrupt. The special verdict in *Bayley* v. *Bunning* has been examined, and it appears upon that that there was no conversion, and therefore the sheriff could not be liable: and that may account for the language of the judges, that the taking was lawful; and which they may have meant to apply to the original taking only, and not to say anything whether, if the goods had been sold, the sheriff would be liable. This case, however, as far as it goes, is confirmed by what the court says in *Phillips* v. *Thompson*, 3 Lev. 191.

Turner v. *Felgate*, 1 Lev. 95, 2 Sid. 125, was then mentioned; and it has been considered as applicable to the present case. That was an action of *trespass* against the creditor who had obtained judgment and levied under a fi. fa., and the judgment was afterwards set aside by rule of court: and it was there said that the sheriff was not liable, because he acted in obedience to the king's writ; and that there is a difference between the party and the sheriff in that respect. There is not the least doubt about that. The sheriff is protected by the writ, and he need only plead that by way of justification to an action of trespass. But the party must plead the judgment. As to this there is no doubt whatever; and every day's experience is so. The sheriff is bound to obey the writ; but

1837.

GARLAND v. CARLISLE.

the party must shew that he had authority to sue out the writ; and that authority is the judgment. If the party was not bound to shew the judgment, it would be in the power of any man, who had obtained no judgment, to sue out any sort of writ of execution, for any amount that he thought proper. But that was a question as to the liability of different persons who had been concerned in executing a writ after a judgment had been set aside, and does not apply to the present case. Here, the writ directs the sheriff to take the goods of A., and if he does take the goods of A., it is immaterial to him whether there was any judgment against A. or not. But the complaint is, that he does not obey the king's writ; and that, being directed to take the goods of A., he takes goods which, though in the possession of A., by operation of the bankrupt law, they ultimately turn out in point of law not to be the goods of A.

The case of *Lechmere* v. *Thorogood*, 3 Mod. 236, 1 Show. 12, Comb. 123, was an action of *trespass* against the sheriff: one of the points in dispute was, whether the crown under an extent, or the party under a fi. fa., was entitled to the goods. But the court said the sheriffs were not liable in this action; and there is no doubt but that, according to the modern cases, he is not liable in trespass. So, in *Smith* v. *Milles*, 1 T. R. 475, it was held that an action of trespass will not lie against the sheriff who seizes goods after an act of bankruptcy and before the issuing of a commission, even though he afterwards sells them. But, at the same time, I must observe, that, in the report of the case of *Lechmere* v. *Thorogood*, in 3 Modern, there is nothing said about the liability of the sheriff. Afterwards an action of trover was brought against Toplady, the party, and Thorogood and another, the sheriffs, for taking the goods—see 1 Show. 146, 2 Vent. 169—and they pleaded the judgment in the former action, and it was held to be a bar. But that was decided merely on the technical ground of law, that, after a judgment for the defend-

1837.

GARLAND v. CARLISLE.

ant in trespass, the plaintiffs could not recover in an action of trover for a conversion of the same goods; and certainly so far making trespass and trover stand upon the same footing: but there is not a syllable said in the latter case as to the liability of the sheriff; and I think no argument can be applied to or any reasoning upon technicalities and the forms of actions, as to whether the sheriff is liable for seizing and selling goods under circumstances like the present.

In *Cole* v. *Davies*, 1 Ld. Raym. 724, Lord Chief Justice Holt held that the sheriff was not liable to an action of trover under circumstances like these. That case (as far as it goes) is an authority for the plaintiff in error; but it is only a Nisi Prius decision, and is only an obiter dictum, not necessary for the decision of the case.

As to the other cases of *Bailey* v. *Bunning*, and *Leckmere* v. *Thorogood*, considering the imperfect manner in which they are reported, and considering also the special verdict in *Bailey* v. *Bunning*, I think they only amount to a declaration of the opinions of the judges there, that, generally speaking, the sheriff was not liable, but by no means to a judgment upon a case like the present, distinctly brought and argued before them: and that therefore the courts in later times are not so far bound by those cases but that they may take another view of the subject, without being considered as unwarrantably overturning former decisions.

The case of *Cooper* v. *Chitty* is the leading case on the point in more modern times. I admit that the facts of that case are not the same as here, for, there, the sale was after notice of the act of bankruptcy, and after the commission and assignment; and that the decision there would not of itself be sufficient to authorise the court to give judgment for the plaintiff. That case has been followed by a variety of others since, in some of which at least the facts were the same as the present. I do not think it at

1837.

GARLAND v. CARLISLE.

all necessary to go through these cases, and comment upon them and upon the language used by particular judges, as that has been so fully done already.

The result of these cases satisfies my mind, that, in the present case, the sheriff is liable; and I may say in addition that I have argued many cases since at Nisi Prius, in which the point has never been doubted. And I would also add, in conclusion, that, if the cases of *Bailey* v. *Bunning* and *Lechmere* v. *Thorogood* had been fully brought before the court upon a case like the present, and the judgment given according to the opinion there expressed by the judges, yet, if I had found, that, for a series of many years, there had been so many decisions and constant practice the other way, then, inasmuch as the later authorities are according to what would be my opinion if the question were now for the first time to come under consideration, I should say that the court ought to act upon the later authorities, though by that means the former decisions should be overturned.

Upon the whole of this case, as to the first question put by your lordships for the consideration of the judges, I am of opinion that the sheriff, under the circumstances stated in that question, is liable to the action of trover there mentioned.

On the second question, I am of opinion that the sheriff is liable, under the circumstances there stated, for the reasons already given. Second question.

The answer to the third question becomes unnecessary. Third question.

PARK, J.—My Lords—The facts of this case have been been so often stated to your lordships both from the bar and by my learned Brothers who have preceded me, that I do not think it necessary to repeat them, nor indeed to enter upon much elucidation of a subject which has already occupied so much of your lordships' consideration.

The first question propounded to us is, whether a sheriff First question.

1837.

GARLAND v. CARLISLE.

seizing and selling goods under a fi. fa., was, in December, 1821, liable in an action of trover brought by the assignees of the defendant in the action in which the fi. fa. was issued, such defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after such sale. To that question I give a positively affirmative answer: and I maintain the great distinction to be between an action of trespass and an action of trover. And this distinction puts an end to the authority of *Lechmere* v. *Thorogood*, 3 Mod. 236, as bearing on this case; for, that was an action of *trespass*, and not trover. Neither can I in the case of bankruptcy understand the weight of the distinction, upon which so much stress has been laid by those who differ from me, between the officer and the execution-creditor.

I agree entirely with those of my learned Brothers who have addressed your lordships, who maintain the affirmative of the first question submitted to us. It seems to me that it would be a great trial of your lordships' patience, and a sad waste of time, after what your lordships have already heard, were I to enter into a full discussion of the reasons which have led me to this conclusion, or into a minute statement of and comment upon the various decisions that have taken place on this subject. It is now eighty-one years that the point which I presume to recommend to your lordships to maintain, except for the decision in *Balme* v. *Hutton*, has been the clear and uniform understanding and doctrine of Westminster Hall. This doctrine your lordships are now called upon to overturn. I shall not be one of those who will recommend it to your lordships to do so. I am the more confirmed in the opinion I am now giving, because, having been called upon in the case of *Balme* v. *Hutton* to review the opinion of one of the ablest judges who has ever sat in Westminster Hall, and having the misfortune to differ from that eminent person, I

1837.

GARLAND v. CARLISLE.

thought it my duty anxiously to weigh every argument that bore upon the subject, and accurately to scan the authority of every case that has been decided on the subject: and the result was, that I found myself *compelled* to differ from that decision. In consequence of the case now at the bar, which revives the doctrine in *Balme* v. *Hutton*, I have again and again considered the arguments then adduced by me, and all the authorities there referred to, and I cannot bring myself to vary in the slightest degree from the opinion I then pronounced after very considerable research. It must be admitted that we are here for the purpose of weighing the propriety of the decisions of the courts below, and that your lordships' House is the supreme appellate jurisdiction. But, with all deference, I cannot take upon me to advise your lordships, as one of her majesty's judges, to overturn, without the most unanswerable arguments, the uniform decisions of eighty years; especially when the judges in *Balme* v. *Hutton* admitted *that* uniformity, though they laid violent hands for their destruction. I admit the *power* of your lordships to concur in that destruction: but the propriety of the exercise of that power under the peculiar circumstances of this case, is for your lordships' judgment.

The question really is, whether the goods when seized were the goods of the bankrupt or the goods of the assignee, by *relation* to the act of bankruptcy. No lawyer will deny that the goods of a bankrupt are, by the act of bankruptcy, and *from its date*, vested in the assignees; and therefore, when a writ commanded the sheriff to seize the goods of A., the sheriff must answer if sued in an action of trover, if he takes goods which, by relation to an act *before* the seizure, had become the goods of B.: for, it is, I conceive, a clear and undoubted rule of law that the sheriff must at his peril seize the goods of that party, and that party only, against whom the writ issued; and, if they have ceased, *without fraud*, to be the goods of the party

1837.

GARLAND v. CARLISLE.

sued, the sheriff is liable for the taking, though not at all acquainted with the change of property.

The *hardship* of such a doctrine has been much pressed upon your lordships. But I own I feel no weight in such an argument, for, there are many cases in which the law casts a liability upon persons not officers; and the statutes of bankrupts make no distinction that I am aware of in favour of the sheriff. Nay, many other persons are often in worse situations than the sheriff: they are often held liable who have no remuneration; whereas the sheriff, though liable often to losses, has also considerable fees to remunerate him. There never was a harder case than that of *Stephens* v. *Elwall*, 4 M. & Sel. 259, in which I was counsel, where a servant was held liable in trover, although the act done by him was done *for the benefit of his master* merely: and, though I strenuously pressed the hardship of the case; yet, the *very* case of liability in a sheriff was urged against me, and Lord Ellenborough said, though the servant acted under unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, his acts might nevertheless amount to a conversion; for, a person is guilty of a conversion who intermeddles with my property, and disposes of it: and it is no answer that he acted under the authority of another, who himself had no authority to dispose of it. The court is governed by the *principle* of law, and not by the hardship of any particular case. Then his lordship puts a still harder case, the common case of trespass, where a servant has done some act in assertion of his master's right, and is liable, not only jointly with his master, but, if the master cannot satisfy it, for every penny of the whole damage.

This case, as to its principle, was confirmed in a case of *Alexander* v. *Southey*, 5 B. & A. 247, though the facts of that case required a different decision. Lord Denman was counsel in the latter case.

On my side of the question, I readily admit that the ownership of the goods is not divested out of him who

1837.

GARLAND v. CARLISLE.

afterwards is declared a bankrupt, *by the mere act of bankruptcy*, or by the issuing of the commission: but it is no less clear, that, when that commission is opened, upon an antecedent act of bankruptcy, the commissioners are directed to *assign all the bankrupt's money, goods, chattels, and debts, wheresoever they may be found or known*, and such assignment, whenever made, shall operate, by relation, so as to vest in the assignees all the property which the trader had at the time when the act of bankruptcy was committed—see s. 12 of the 6 Geo. 4, c. 16. It is supposed that this relation to the act of bankruptcy is a fiction of law, not to be favoured. But this is to beg the question; for, I take the liberty to deny that it is a fiction: it is a rule established wisely (though judiciously relaxed in many cases by the authority of parliament, but which exceptions prove the rule,) to prevent the danger the estate being subjected to fraudulent or improvident dispositions which falling men might have recourse to. This rule has not been considered as a fiction, but a just and necessary rule, by some of our wisest judges. Lord Hardwicke, in *Billon* v. *Hyde*, 1 Ves. sen. 326, says: "By the act of bankruptcy, all the real and personal estate vested in the assignees from the time of the act of bankruptcy committed; and that may go back to a great length of time; and it overcharges all those acts, without regard to the fairness or fraud in them. This relation not only overcharges acts done in pais, and contracts entered into by such person having committed acts of bankruptcy, but also acts on record, and legal acts done by him, such as judgments, so that, *if execution be taken out after the act committed* (the very case), *upon a judgment before*, that execution is undone and set aside. It is said this rule is contrary to the general reason of the law, which says that fictions of law shall not enure to the wrong of any one. But the reason of taking this case out of the general rule is plainly this, that it is better to suffer a particular mis-

1837.

GARLAND v. CARLISLE.

chief than an inconvenience; and the legislature foresaw there would be a particular mischief, which they cured by that proviso, but did not extend it further, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments would put it in their power to defeat their just creditors of their debts; so, as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." So far Lord Hardwicke: and I think, upon principle, independent of all authority of decided cases, I am well warranted in concluding, that, whatever time the assignment may be executed, *all the property which the bankrupt had at the time when he committed the act of bankruptcy passed to his assignees.*

That this law extends to all those who sell, dispose of, or remove the goods of the bankrupt after an act of bankruptcy, seems rather to be admitted; and there is no *express* exception of the sheriff in the statute, by reason of his situation and character: neither can I find any principle or authority for an *implied* exception.

I have already slightly discussed the supposed hardship of the case, which is the only possible ground that can be suggested for an implied exception. But, besides what I have already said, the law holds him equally responsible in many cases where he has acted in a manner as free from blame as in the present; as, in escapes, extortion of his bailiffs and other ministers, from whom, if he be wise, he takes ample security, and, if not, he is at all events civilly responsible, and actually must suffer if he do not take such security. There never was a much harder case than *Glasspoole* v. *Young*, 9 B. & C. 696, 4 M. & R. 538, where the sheriff of Surrey, having seized the goods of a woman for the debt of a man who had married her, a former wife being alive, the woman, who was perfectly innocent of the man's conduct, recovered against the sheriff in trover.

Hardship was much urged by the counsel for the sheriff and admitted by Lord Tenterden; but he said, if, on account of this hardship, we were to make this rule absolute, we should break in upon a well-established rule of law, that, if by process the sheriff is desired to seize the goods of A., and he takes the goods of B., he is liable to be sued in trover for them. Besides, wherever the hardship of relation has been very urgent, the legislature has afforded relief: but, as was well observed by Tindal, C. J., in *Balme* v. *Hutton*, the legislature not having interfered in the present case, why is such an exception to be engrafted upon the statute by us, whose duty it is to *declare*, not to *make* the law?

Thus stands the case, looking only at the principles which ought to govern it; but, when we look at authority, there is only one continued series of decisions for the last eighty-one years, by some of the ablest men that have ever adorned the seat of justice during all the ages of the British Constitution. In the present state of public business, and after the very full statement of the various cases by my Brethren who have preceded me, it would be improper to occupy time in doing more than merely mentioning their names and those of the eminent persons who decided them. But, before I do this, I would first say a word or two about the three cases of antient date supposed to be at variance with my present opinion. *Lechmere* v. *Thorogood* I disposed of at the outset, by saying that was an action of trespass; and no judge has ever said that the sheriff, under these circumstances, would be a trespasser. The report of *Cole* v. *Davies* is very short, and states none of the facts, and is a mere Nisi Prius case; and *Bailey* v. *Bunning* is to me not very intelligible. But, if they were of greater weight and more clear than they appear to me to be, I cannot allow them to be considered as of so much weight, when compared with the strong current of authority from *Cooper* v. *Chitty* to the present day—

1837.

GARLAND v. CARLISLE.

always excepting the authority of two eminent persons, then judges, who decided *Balme* v. *Hutton*, in the Exchequer, and their two very learned Brethren *now* present who concurred in that judgment.

The first case, then, is *Cooper* v. *Chitty* (best reported in Lord Kenyon's Reports), decided by Lord Mansfield, after two learned arguments by celebrated counsel of that day, and time taken to deliberate, assisted by Mr. Justice Dennison, who was always considered as an eminent lawyer, Wilmot, afterwards Lord Chief Justice of the Common Pleas, and the very learned Mr. Justice Foster. In *Smith* v. *Milles*, 1 T. R. 475, Ashhurst and Buller, two most profound lawyers, decided that *trespass* would not lie against the sheriff, but that trover would: and quoted largely from *Cooper* v. *Chitty*. I have said these were both eminent lawyers. Mr. Justice Ashhurst was not an eloquent, but was always esteemed a very learned judge: and of Mr. Justice Buller's profound legal knowledge no one ever doubted.

In *Potter* v. *Starkie*, that considerable lawyer, Mr. Baron Wood, held, first on the Northern Circuit (4 M. & Sel. 260), and the court of Exchequer confirmed his ruling, that, although the sheriff seized, sold, and actually paid over the money *before the commission* and *before notice* of the act of bankruptcy, which had preceded the seizure, the sheriff was liable *in trover, the acts of seizure and sale being an unlawful interference with another man's goods*. *Lazarus* v. *Waithman* was decided in the time of Dallas, C. J.: and, having been his colleague all his time, I will venture to say that no man living ever took more anxious pains than he did to form correct judgments; and Burrough, J., who had known Westminster Hall from the year 1770, said the point had been settled long before he knew the profession; and Richardson, J., whose experience was very considerable in cases of this description, added, that the law in cases of this nature had long been settled, and frequently

so ruled at Nisi Prius: and two better lawyers than Burrough and Richardson could not be found. It is also to be observed, that, although *Bailey* v. *Bunning* and the two other old cases were not mentioned by the judges, they had been quoted at the bar, and therefore the court had them under consideration. *Price* v. *Helyar* is another decision of the Common Pleas to the same effect, and an elaborate judgment delivered by the Lord Chief Justice, now one of your lordships' House, as the joint opinion with him of Mr. Justice Burrough and myself.

I must not add the authority of Lord Chief Justice Tindal, Bosanquet, J., and Alderson, J., in *Carlisle* v. *Garland*, because that case is now under consideration. But I may call in aid the case of *Dillon* v. *Langley*, 2 B. & Ad. 131, where the sheriff was held liable in trover, though he did not know of an act of bankruptcy at the time of the seizure or beginning of the sale; that ever to be lamented judge, Lord Tenterden, declaring, that, "though the sheriff must obey the writ, he is required to know whose goods he takes; and we ought to say we consider ourselves bound by the many decisions which have taken place establishing the liability of the sheriff." And, though it was not the question in judgment in *Hitchin* v. *Campbell*, 2 Sir W. Blac. 829, it being an action of assumpsit against the judgment-creditor; yet Lord Chief Justice De Grey, in delivering the joint judgment of himself, Gould, Blackstone, and Nares, expressly pronounces a similar opinion to those I have already stated to your Lordships. Indeed, another most eminent person now on the judicial Bench, and now present, has said, that, ever since he became a member of the profession, and was in the habit of advising others, he considered that there was no question of bankrupt law more completely settled than this: he never heard that any difficulty was entertained about it, and felt much surprise when the objection was first taken in *Balme* v. *Hutton*. And I ought also to add, what

1837.

GARLAND v. CARLISLE.

is stated by Lord Chief Justice Tindal, and upon my own remembrance also, that, when the judges were engaged in discussing the case of *Balme* v. *Hutton* amongst themselves, previously to the delivery of their judgment in the Exchequer Chamber, the late learned Lord Tenterden declared it to be his opinion, that, from the numerous decisions in the courts of Westminster Hall, the law was settled against the sheriff, so that it was no longer a subject for argument; and that, even if the case were res integra, he should come to the same conclusion.

I am aware that your lordships are not bound by those decisions, were they ten times more numerous than they are: yet the cases are so numerous; judges have been followers of the rule; counsel and attornies have advised, relying upon it; assignees have known and abided by it for nearly a hundred years; and the law, as I have said, has not only been received in Westminster Hall, but throughout the kingdom—that, called upon by your lordships to give my advice on this point, in order to guide your decision, I cannot, as one of her majesty's judges, presume to recommend your lordships, but, on the contrary, I have no difficulty in saying it would be most dangerous, to overturn or even to shake it.

Second question.

The second question is required by your lordships to be answered by those who are of opinion that the first question is to be answered affirmatively. I being one of those, I merely think it necessary to say that the answer to the second is a necessary corollary to those affirming the first: for, the sheriff cannot be in a more favourable condition, as to his liability to the true owner of the goods (*that is*, the assignee) by giving up the goods to an arrangement between the plaintiff and defendant. Indeed, it affords a more clear conversion than by following the directions of the writ.

Third question.

Having answered the first question affirmatively, I am not required to give any answer to the third question proposed by your lordships.

1837.

GARLAND v. CARLISLE.

First question.

TINDAL, C. J.—My Lords—Without entering into the discussion whether the first question which has been proposed to her majesty's judges by your lordships, has become res judicata, by a long course of authorities in Westminster Hall, I beg to offer my humble opinion, that, upon principle, and the proper construction of the statutes by which this question must be determined, the sheriff under the facts supposed by your lordships in your first question, *is* liable to an action of trover brought by the assignees of the bankrupt.

By the very first statute, the 34 & 35 Hen. 8, c. 4, s. 1, power is given to the officers therein named to cause the lands and the goods of bankrupts (in that act called offenders,) to be sold, and such sales are directed "to be good and effectual in the law to all intents and purposes against the said offenders, their heirs and executors, for ever, as though the same order, direction, bargain, and sale had been made by the said offender or offenders at his or their own free will and liberty, by writing indented, inrolled in any of the king's courts of record." By the 13 Eliz. c. 7, s. 2 (the second of the bankrupt acts), the Lord Chancellor is impowered to appoint persons by commission under the great seal, who shall have power to make such sale; and it is enacted by the statute that their sale "shall be good and effectual in the law to all intents, constructions, and purposes, against the said offenders, their wives, heirs, children," and "against all other person or persons claiming by, from, or under such offenders, by any act or acts had, made, or done after any such person shall become bankrupt as is aforesaid."

The relation to the act of bankruptcy established by these two statutes, stood, as I conceive, upon the same footing in the year 1821, when the transaction now in question arose; for, no material alteration took place as to the general rule in the intervening time. And the legal effect and operation of those two statutes appear to me

1837.

GARRARD v. CARLISLE.

to be, that, with respect to the bankrupt himself, his heirs and executors (under the statute of Hen. 8), and with respect to all claiming by, from, or under the bankrupt (by the statute of Elizabeth), the assignment by the commissioners has precisely the same force as if the bankrupt had himself, at the moment before he committed the act of bankruptcy, made a valid sale of all the property which at that time belonged to him.

Now, in these statutes, upon which the relation to the act of bankruptcy is originally founded, there is not any exception of any kind inserted: *all* are bound by the statutes—bonâ fide purchasers of lands and goods, though for a valuable consideration, and without notice—debtors who have paid the amount of the sums due from them—creditors of the bankrupt to whom the amount of debts owing to them from the bankrupt has been paid, though without notice—are all included. The law, indeed, has itself engrafted one exception, and only one exception, viz. that the interests of the crown shall not be affected by such relation to the act of bankruptcy: and the only ground upon which that exception is founded, is this, that the crown is not bound by the statutes relating to bankrupts, because the king is not named in them.

The question therefore is, whether upon any, and, if any, what, legal ground are sheriffs to be held exempted from the operation of this statutory relation. If the trader had bonâ fide sold and conveyed any part of his personal property to a purchaser for a valuable consideration, the moment before the act of bankruptcy was committed, the sheriff would, beyond all controversy, have been liable in an action of trover brought by the purchaser, if he had seized such personal property under a fi. fa. issued against the trader after the act of bankruptcy committed, notwithstanding the existence of the prior conveyance and sale was altogether unknown to him. He would in that case have taken, under a writ directing him to seize the goods

of A., not the goods of A., the defendant in the action, but the goods of B., a stranger: and, if the effect of the statutes is, to put the order and sale of the commissioners, by relation to the act of bankruptcy, precisely upon the same footing as the actual conveyance by the bankrupt himself whilst he had the power to convey, I cannot see why the same legal rights as to the assignees, and the same legal consequences as to the sheriff, are not to follow in the one case as in the other.

It has been objected, in the course of the argument, that the sheriff cannot be held to fall within the description of the persons mentioned in the statute of Elizabeth, as he claims nothing "by, from, or under the bankrupt." It is true, indeed, that he claims nothing *for his own benefit*; but it is equally true that he has acted in aid and assistance of one who claims from or under the bankrupt, namely, the judgment-creditor, who caused the writ to be issued under which the sheriff has seized the goods. And, indeed, if the sheriff is to be held a person not falling within that description, he would be equally without the reach of it, whether the execution of the writ took place before or after the issuing of the commission; in which latter case, no one has ever doubted the sheriff's liability.

And in the view which I take of the operation of these statutes, I cannot look upon the relation to the act of bankruptcy as any fiction of law, but as a statutory relation declared in plain and unequivocal terms by the legislature, and intended for wise and salutary purposes: for, without it, there would be so large an opening for fraud that the bankrupt law would soon be rendered a dead letter. It is attended, no doubt, in many cases, with great hardship: but the legislature has from time to time made exceptions in favour of particular classes of cases, where it was thought the general convenience would not suffer by a partial relaxation of the rule—instances of which are,

1837.

GARLAND v. CARLISLE.

the case of payment of debts to the bankrupt before notice of an act of bankruptcy (1 Jac. 1, c. 15), the limitation of five years in the case of the sale of real property after a secret act of bankruptcy (21 Jac. 1, c. 19), the case of payments by the bankrupt to creditors for goods sold (19 Geo. 2, c. 32); and again, more largely, the case of conveyances, contracts, and other dealings and transactions with bankrupts bonâ fide made and entered into more than two calendar months before the date and issuing of the commission—46 Geo. 3, c. 65.

Now, the very circumstance of these partial restrictions of the general rule of relation to the act of bankruptcy, establishes beyond doubt two propositions—first, that no consideration of hardship in the individual case will be sufficient to exempt it from the reach of the statutory relation—and, next, that nothing short of the power of the legislature itself is sufficient to relax the severity of the former statutes.

It appears, therefore, to me that the case of a sheriff executing a writ of fi. fa., after an act of bankruptcy committed, upon the goods which had been those of the bankrupt, by seizing and selling the same, is, upon the proper construction of the statutes above referred to, a wrongful conversion by the sheriff of the goods of the assignees, and consequently renders him liable to an action of trover at the suit of the assignees.

I purposely forbear entering into the discussion of the cases which have been decided on this point, first, because I think the action maintainable on principle, and it is consequently less necessary to bring them before your lordships; and, next, because they have already been so fully brought under your lordships' consideration by my Brethren who have preceded me, that it would be an unnecessary occupation of the attention of your lordships.

Second question.

Upon the second question, the opinion which I have formed, is, that the sheriff is liable, if, after seizing the

1837.

GARLAND v. CARLISLE.

goods, he permits them to be disposed of according to an arrangement between the plaintiff and the defendant in the action, without proceeding to a sale, the sheriff nevertheless receiving his poundage: for, I consider the sheriff by no means in a more favorable condition as to his responsibility to the true owner of the goods, by omitting to pursue the mandate and exigency of the writ, in proceeding to make an actual sale: on the contrary, as it seems to me, the giving up of the goods of the assignees to the disposition of the plaintiff and the defendant in that action, affords more clear evidence of conversion than the following up of the directions of the writ.

In the view which I take of the first question, the third which has been proposed by your lordships, will not be expected to be answered by me.

Lords DENMAN and ABINGER (who delivered their opinions orally, as members of the House of Lords) concurred (as also did the Lord Chancellor) with the majority: and consequently the judgment of the court below was—

Affirmed.

POTTER and Another, Assignees, &c., *v.* STARKIE and Others.

When the sheriff, after a secret act of bankruptcy (though before the issuing of a commission), sells goods of a trader seized under a fi. fa. before the act of bankruptcy was committed, he is guilty of a conversion; the property being divested by the bankruptcy.

TROVER against a sheriff. At the trial before Wood, B., at the Lancaster Summer Assizes, 1807, the facts that appeared in evidence were as follow:—A writ of fi. fa. against the bankrupt was delivered to the sheriff on one day, an act of bankruptcy was committed by the debtor on the next, and the seizure under the writ took place on the third day. The commission was not sued out until *after the sale*. Wood, B., told the jury, that, as the execution was not complete by the delivery of the writ to the sheriff, but by the seizure, and as an act of bankruptcy had intervened before that time, the goods were no longer the goods of the bankrupt, but of his assignees, by relation, and that the sheriff was therefore guilty of a conversion.

Richardson, in the present term, obtained a rule nisi (in the court of Exchequer) for a new trial, on the ground that the sheriff, having acted only in obedience to the writ, and without notice, was not liable in this form of action. He cited *Cooper* v. *Chitty*, 1 Bur. 20, 1 Sir W. Blac. 65, and *Timbrell* v. *Mills*, 1 Sir W. Blac. 205, to shew, that until there was some notorious act, like a commission and assignment (of which perhaps the sheriff would be bound to take notice), the sheriff is bound to obey the writ; and submitted that the sheriff in this case could not have returned nulla bona, the property not being out of the bankrupt till *assignment*; that *Cooper* v. *Chitty* was founded solely upon this distinction—the sale there being *after the assignment*; for, the seizure is there said to be innocent.

Williams, contra, endeavoured to shew that the grounds of distinction, as suggested on the other side, between *Cooper* v. *Chitty* and the case at bar were not maintainable, as is obvious from Lord Mansfield's alternately taking and abandoning them; that the sale follows the nature of the seizure, and is in truth no new transaction; and that therefore the seizure was the conversion, or there was none at all. He further submitted that there was no notice in *Cooper* v. *Chitty*, though Lord Mansfield extrajudicially talks of length of time: so that this supposed distinction fails. And he shewed that *Timbrell* v. *Mills* was, as to the point decided, wholly irrelevant; and objected to the supposed dictum as not being found in the other reports of *Cooper* v. *Chitty* (and to these are to be added Lord Kenyon's note—1 Ld. Ken. 395): and concluded that the sheriff, having taken goods not mentioned in the writ, but other goods of other persons, was guilty of a conversion—the point of property in the plaintiffs having been conceded early in the argument.

And of this opinion was the Court, who discharged the rule, holding, that, upon the authority of *Cooper* v. *Chitty*, the property must be considered as divested by the bankruptcy.

INDEX.

ACCORD AND SATISFACTION.

See PLEADING, 5.

ACCOUNT STATED.

See AFFIDAVIT TO HOLD TO BAIL, 1.

ACKNOWLEDGMENT.

In Lieu of Fine, under 3 *&* 4 *Will.* 4, *c.* 74.

1. It is not absolutely necessary that affidavits used on motions under the 91st section of the act, should be intituled "In the Common Pleas." In re Bates, 396.

2. Charges for taking acknowledgments of deeds, and for examining married women, and for proceedings under the act for the abolition of fines and recoveries, 3 & 4 Will. 4, c. 74, for completing and giving effect to such acknowledgments and examinations, do not constitute taxable items within the 2 Geo. 2, c. 23, s. 23. Ex parte Branson, 539.

ACTION ON THE CASE.

See CASE.

ADMINISTRATION BOND.

In an action by creditors of an intestate, in the name of the Archbishop, upon an administration bond, against a surety, it appearing that the action was brought without the knowledge or assent of the nominal plaintiff, and without indemnifying him against costs, and the judge of the Prerogative Court declining to permit the bond to be taken out of the registry for the purpose of giving the defendant oyer in the usual way (profert having been made by the declaration):—This court refused to make a rule that production of the bond to the defendant's attorney, at the plaintiff's expense, at the office in Doctors' Commons, or the delivery to the defendant's attorney of *an attested copy* of the bond, should be deemed sufficient oyer. Archbishop of Canterbury v. Tubb, 543.

AFFIDAVITS.

Intituling.

It is not absolutely necessary that affidavits used on motions under the 3 & 4 Will. 4, c. 74, s. 91, should be intituled "In the Common Pleas." In re Bates, 396.

AFFIDAVIT TO HOLD TO BAIL.

Where Sufficient.

1. An affidavit to hold to bail alleged that the defendant was indebted to the plaintiff in a certain sum "on the balance of an account stated between them:" Held, sufficient. Tyler v. Campbell, 384.

2. It is not necessary in an affidavit to hold bail to shew any connection between the deponent and the plaintiff: it is enough that the existence of the debt is positively sworn to, without shewing the deponent's means of knowledge of its existence. Holliday v. Lawes, 354.

3. An affidavit to hold to bail stated that the defendant was indebted to the deponent in a certain sum "for materials found and provided, goods sold and delivered, and work and labour done and performed by the deponent to and for the use and benefit of the defendant, and at his request:"—Held, sufficient. Lucas v. Goodwin, 300.

AMENDMENT.

Of Writ of Trial.

Where a cause (which has been made a remanet) is tried before the sheriff on a day subsequent to the return day of the writ of trial, the court will amend the writ. Sherman v. Tinsley, 286.

ANNUITY.

1. A case not comprehended within the 3rd section of the 3 & 4 Will. 4, c. 27, is not therefore excluded from the operation of the 2nd section. Therefore, an annuitant claiming under a will is barred by that statute, where more than twenty years have elapsed since the right to the annuity first accrued to him, though he has *never* received any part of the annuity. James v. Salter, 168.

2. The non-inrolment of an annuity-deed under the 53 Geo. 3, c. 141, s. 2, cannot be taken advantage of under non est factum. Massey v. Nanney, 258.

And see STAMPS, 3, 4.

ARREST.

Discharge from.

1. The court refused to discharge a foreigner out of custody, on the ground that the debt for which he had been arrested was the balance of a demand upon which the plaintiff had received a dividend under proceedings in the country where the debt was contracted similar to our proceedings in bankruptcy; though it was sworn by a competent person that the law of the foreign country did not warrant an arrest of the person under such circumstances. Brettillot v. Sandos, 201.

Second Arrest.

2. After an undertaking by the defendant's attorney to put in bail, in order to prevent an actual arrest (the party having already been arrested for the same debt, and discharged on the ground of an irregularity in the process), the defendant cannot object that the second arrest was improper, for want of a judge's order. Holliday v. Lawes, 354.

ATTACHMENT.

For Non-performance of Award.

1. To warrant a motion for an attachment against a party for non-performance of an award, the order of Nisi Prius or the submission must appear to have been previously made a rule of court. Mayor of Bath v. Pinch, 299.

2. Two actions of trespass and all matters in difference between the parties touching a disputed right of way, were referred to arbitration. The arbitrator by his award directed that the defendant should give an undertaking to discontinue the user of the way in question. On a motion for an attachment for non-performance of the award, the order of Nisi Prius having been made a rule of court, the defendant swore that he had not himself used the way, nor had it been used by any of his servants with his consent or knowledge:—The court refused to grant the attachment. Russell v. Yorke, 422.

ATTORNEY.

Retainer of.

1. The plaintiff entered into an agreement with one J. S. for a lease of certain land in which J. S. had a life interest. By this agreement, which was drawn up by the plaintiff, and signed by the parties in his presence, it was stipulated that the lease and counterpart should be prepared by the plaintiff at the expense of the defendant. The draft of the lease and counterpart were accordingly prepared and settled, but, before they could be executed, J. S. died:—Held, that there was sufficient evidence of a retainer of the plaintiff by the defendant to entitle the latter to maintain an action for the costs of preparing the lease and counterpart. Webb v. Rhodes, 497.

Confidential Communications.

2. A. being desirous of raising money upon property the title deeds of which were in the hands of the defendant, who had a lien thereon, applied to C., an attorney, to procure a loan for her. An abstract was furnished to him, which he compared with the original deeds, but ultimately declined to advance the money:—Held, that C. could not be permitted to use the knowledge thus acquired by him to the defendant's prejudice. Doe d. Peter v. Watkins, 155.

Duties and Liabilities.

3. A conveyance was made by one L. to his son for the purpose of giving the latter a colorable qualification to kill game:—Held, that the attorney who prepared and attested the deed, knowing the purpose for which it was to be used, and himself actively furthering the object of the parties, could not afterwards (in trover by the son for the deed) contend that nothing

passed to him under it. Lord v. Wardle, 402.

Lien of.

4. Interlocutory costs may, under the 93rd rule of Hilary Term, 2 Will. 4, be set off against the final costs of the cause, without regard to the attorney's lien. Halliday v. Lawes, 475.

Bill of Costs.

5. A charge in an attorney's bill for searching for an old judgment, and advising as to its revival, does not constitute an item taxable within the statute, 2 Geo. 2, c. 23, s. 23. In re Rice, 416.

Undertaking.

6. It is not necessary in an affidavit to hold to bail to shew any connection between the deponent and the plaintiff: it is enough that the existence of the debt is positively sworn to, without shewing the deponent's means of knowledge of its existence. Holliday v. Lawes, 354.

AWARD.

Attachment for Non-performance.

1. To warrant a motion for an attachment against a party for non-performance of an award, the order of Nisi Prius or the submission must appear to have been previously made a rule of court. Mayor of Bath v. Pinch, 299.

2. Two actions of trespass and all matters in difference between the parties touching a disputed right of way, were referred to arbitration. The arbitrator by his award directed that the defendant should give an undertaking to discontinue the user of the way in question. On a motion for an attachment for non-performance of the award, the order of Nisi Prius having been made a rule of court, the defendant swore that he had not himself used the way, nor had it been used by any of his servants with his consent or knowledge:—The court refused to grant the attachment. Russell v. Yorke, 422.

BAIL.

Who may be.

1. In an action on a bill of exchange, by indorsee against *acceptor*, the *drawer* is a competent bail. Prime v. Beesley, 37.

Justification.

2. The court permitted bail to justify after being disallowed at chambers for not being prepared to give an account of his debts and credits. Clarke v. Vestris, 391.

3. Bail cannot be called upon to disclose the name of the party at whose request they appear to justify, provided such party is not the attorney or the clerk to the attorney for the defendant, and they are not indemnified. Jones v. Vestris, 395.

Substituted Bail.

4. Where the bail of whom notice has been given are *rejected*, other bail cannot be substituted without the leave of the court or a judge. Jones v. Vestris, 394.

BAIL BOND.

Staying Proceedings on.

The defendant was arrested on the 28th March, and gave a bail-bond on the 4th April. The plaintiff declared de bene esse and took an assignment of the bail-bond, and the defendant afterwards, on the 17th April, (having given an undertaking to allow the plaintiff to go on with the original action notwithstanding the proceedings on the bail-bond) pleaded, and bail above justified on the 19th:—The court stayed the proceedings on the bail-bond, without allowing it to stand as a security, there being time for the plaintiff to go to trial at the last sitting in term, the defendant taking short notice. Clarke v. Vestris, 391.

BANK OF ENGLAND.

Exclusive Privileges of.

1. A copartnership consisting of more than six persons, carrying on the business of bankers within sixty-five miles of London, cannot legally, in the course of such business, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance: such a course of dealing being prohibited by the various statutes now in force relating to the Bank of England. Bank of England v. Anderson, 50.

2. Quære whether an acceptance given by more than six persons in partnership, but not as bankers, or by more than six persons in partnership as bankers, but

given in payment of their private debt, as for goods sold, or salaries of clerks, or rent, or the like, would or would not fall within the restriction in the Bank acts as to the acceptance by companies consisting of more than six individuals of bills of exchange at a less date than six months? Bank of England v. Anderson, 107.

3. The acceptance by a banker of a bill drawn upon him by his customer, at a distant day, for the payment of the drawer's money in the hands of the drawee, is a *borrowing* or owing of money by the banker within the meaning of the Bank acts. Bank of England v. Anderson, 118.

4. The acceptance by a banker of a bill drawn by a customer on account of money of the latter in the hands of the former, is a borrowing of money on the acceptor's bill within the meaning of the Bank acts. Bank of England v. Anderson, 120.

BANKERS.

See BANK OF ENGLAND.

BANKRUPT.

Debts proveable under the Fiat.

1. The defendant, as surety for one J. B., on the 1st March, 1832, executed a bond conditioned for the payment by J. B. of one year's interest, viz. 5*l.*, on the 1st March, 1833, a like sum on the 1st March, 1834, and 205*l.*, principal and interest, on the 1st March, 1835. J. B. paid the first year's interest on the 30th March, 1833, and the second on the 5th April, 1834, but omitted to pay the 205*l.* due on the 1st March, 1835. The defendant, the surety, committed an act of bankruptcy on the 10th June, 1833, upon which a commission issued on the 20th, under which he on the 24th August obtained his certificate:—Held, in an action against the surety, that the bond, being forfeited before the defendant's bankruptcy, constituted a debt proveable under the commission, and consequently that his certificate was a bar to the action. Skinners' Company v. Jones, 271.

Protected Payments.

2. In order to the validity of a payment to a bankrupt under the 6 Geo. 4, c. 16, s. 82, the *sale* in respect of which the payment is made must be a bona fide sale in the usual course of business. Devas v. Venables, 123.

BILLS OF EXCHANGE.

Drawing.

1. In assumpsit against the *drawer* of a bill of exchange, the plaintiff must allege a promise to pay. Henry v. Burbidge, 296. [But see Griffith v. Roxbrough, 2 M. & Welsby, 734.]

Acceptance.

2. A copartnership consisting of more than six persons, carrying on the business of bankers within sixty-five miles of London, cannot legally, in the course of such business, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance: such a course of dealing being prohibited by the various statutes now in force relating to the Bank of England. Bank of England v. Anderson, 50.

3. Quære whether an acceptance given by more than six persons in partnership, but not as bankers, or by more than six persons in partnership as bankers, but given in payment of their private debts, as for goods sold, or salaries of clerks, or the like, would or would not fall within the restriction in the Bank acts as to the acceptance by companies consisting of more than six individuals of bills of exchange at a less date than six months? Bank of England v. Anderson, 107.

4. The acceptance by a banker of a bill drawn upon him by his customer, at a distant day, for the payment of the drawer's money in the hands of the drawee, is a *borrowing* or owing of money by the banker within the meaning of the Bank acts. Bank of England v. Anderson, 118.

5. The acceptance by a banker of a bill drawn by a customer on account of money of the latter in the hands of the former, is a borrowing of money on the acceptor's bill within the meaning of the Bank acts. Bank of England v. Anderson, 120.

6. In an action on a bill of exchange, by indorsee against *acceptor*, the *drawer* is a competent bail. Prime v. Beesley, 37.

Notice of Dishonour.

(*a*) *Form of.*

7. In an action by an indorsee against an indorser of a promissory note, the fol-

lowing letter addressed by the plaintiff to the defendant—"The promissory note for 200*l.* drawn by H. H., dated the 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore request you will let me have the amount forthwith"—was held not to be a sufficient notice of dishonor, inasmuch as it conveyed no intimation that the note had been duly presented and dishonored. Boulton v. Welsh, 425.

(b) Where dispensed with.

8. The drawer of a bill being asked if he was aware that the bill had been dishonoured, answered: "Yes: I have had a very civil letter from Mr. G. on the subject; and I will call and arrange it." In an action against the drawer—Held, that the above admission relieved the plaintiff from the necessity of proving a regular notice. Norris v. Salomonson, 257.

And see PLEADING.

BOND.

The defendant, as surety for one J. B., on the 1st March, 1832, executed a bond conditioned for the payment by J. B. of one year's interest, viz. 5*l.*, on the 1st March, 1833, a like sum on the 1st March, 1834, and 205*l.*, principal and interest, on the 1st March, 1835. J. B. paid the first year's interest on the 30th March, 1833, and the second on the 5th April, 1834, but omitted to pay the 205*l.* due on the 1st March, 1835. The defendant, the surety, committed an act of bankruptcy on the 10th June, 1833, upon which a commission issued on the 20th, under which he on the 24th August obtained his certificate:—Held, in an action against the surety, that the bond, being forfeited before the defendant's bankruptcy, constituted a debt proveable under the commission, and consequently that his certificate was a bar to the action. Skinners' Company v. Jones, 271.

And see ADMINISTRATION BOND.

CANAL COMPANY.

By a canal act the company were empowered to borrow and take up money upon the credit of the undertaking and the rates or duties made payable by the act, and by writing under their common seal to mortgage or assign over the undertaking and the rates or duties to the persons advancing the money, as a security for the money so borrowed; and a form of mortgage was given, whereby the company engaged to pay the interest half-yearly:—Held, that the property of the company and the rates or duties alone were pledged for the payment of the monies advanced; and that the proprietors were not liable to be sued in covenant for arrears of interest. Pontet v. The Basingstoke Canal Navigation Company, 182.

CASE.

For Negligence.

1. Case lies against a man for negligently and improperly keeping a stack of hay put together in such a state as to be likely to ignite, and which eventually does ignite, and his neighbour's premises are injured. Vaughan v. Menlove, 244.

2. At the trial the judge told the jury that the question for them to consider, was, not whether the defendant had acted according to the best of his skill and judgment in the adoption of measures calculated to avert the threatened danger, but whether he had acted with such a reasonable degree of caution as a prudent and careful man might have been expected to exercise; and that, if they thought the defendant had not acted with reasonable care and prudence, but had been guilty of gross negligence, the plaintiff was entitled to a verdict:—Held, that this direction was substantially correct. *Ibid.*

CERTIFICATE.

Under 22 & 23 Car. 2, c. 9.

In trespass for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods, the defendants pleaded—first, not guilty—secondly, an entry to distrain for rent in arrear. A verdict having been found for the plaintiff (with a farthing damages) on the first issue, and for the defendant on the second:—Held, that the plaintiff was not entitled to costs, in the absence of a certificate, under the 22 & 23 Car. 2, c. 9, that the freehold was chiefly in question. Dunnage v. Kemble, 365.

CHARGE ON LANDS.

See STAMPS, 2.

CHARTERPARTY.

See PLEADING, 5.

CHURCHWARDENS AND OVERSEERS.

1. Quære whether churchwardens and overseers have power to mortgage lands devised to the parish for the repair of the church, to reimburse the rector for sums expended by him in such repairs at the request of the inhabitants. Wrench v. Lord, 381.

2. At a vestry meeting the following resolution was agreed to, and signed by the churchwardens and overseers for the time being, and stamped with a 20*s.* stamp:—"The undersigned consent to the liquidation of the debt due to Dr. Wrench, amounting to 53*l.* 7*s.*; to be charged upon the income of the church land; 8*l.* 8*s.* to be collected by a church-rate; amounting in the whole to 61*l.* 15*s.*: such money so to be paid from the rents of the church land, after discharging the bills outstanding and such repairs of the church as may be ordered by the archdeacon for the time being during the progress of the abovementioned liquidation:"—Held, that this entry, if operative at all, could only operate as a charge upon the land, and therefore a 20*s.* stamp was not sufficient to render it admissible in evidence. *Ibid.*

COMMISSION.

For Examination of Witnesses under 1 *Will.* 4. *c.* 22, *s.* 4.—*See* WITNESS, 1.

CONFIDENTIAL COMMUNICATIONS.

See ATTORNEY, 2.

CONSOLIDATION RULE.

An insurance cause had been twice tried by special juries, and a verdict on each occasion found for the plaintiff:—The court refused to open the consolidation rule, in order to the trial of another action on the same policy; it not appearing that the case had not been fully brought before the two former juries—Vaughan, J., diss. Foster v. Allenby, 535.

COSTS.

CONTRACT OF SALE.

See SALE.

COSTS.

General Costs in the Cause.

1. In trespass for breaking and entering the plaintiff's close, the defendant pleaded—first, not guilty—secondly, that the plaintiff was not lawfully possessed of the close—thirdly, a right of way. The jury found for the plaintiff on the first and second issues, *damages*, 1*s.*, and for the defendant on the third. The associate having delivered the postea to the plaintiff—the court ordered it to be returned, the defendant having succeeded on the only real issue, and therefore being entitled to the general costs in the cause, and the award of damages on the first and second issues being clearly a mere slip. Staley v. Long, 481.

2. In trespass for breaking and entering the plaintiff's close, the defendants pleaded, not guilty, that the close was not the close of the plaintiff, and then justified under a right of way for the purpose of carrying goods to and from, and water from a river. The jury by their verdict established the right claimed in the third plea as far as it related to the fetching of water from the river:—Held, that the defendants were substantially the successful party, and therefore entitled to the general costs of the cause, as well as to the costs of the witnesses called in support of the right established by the jury in their favour, notwithstanding these witnesses also spoke to the right claimed in the other part of the same plea, as to the carriage of goods. Knight v. Woore, 360.

3. In trespass for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods, the defendants pleaded—first, not guilty—secondly, an entry to distrain for rent in arrear. A verdict having been found for the plaintiff (with a farthing damages) on the first issue, and for the defendant on the second:—Held, that the plaintiff was not entitled to costs, in the absence of a certificate, under the 22 & 23 Car. 2, c. 9, that the freehold was chiefly in question. Dunnage v. Kemble, 365.

What constitute taxable Items.

4. A charge in an attorney's bill, for searching for an old judgment, and ad-

vising as to its revival, does not constitute an item taxable within the statute, 2 Geo. 2, c. 23, s. 23. In re Rice, 416.

5. Charges for taking acknowledgments of deeds, and for examining married women, and for proceedings under the act for the abolition of fines and recoveries, 3 & 4 Will. 4, c. 74, for completing and giving effect to such acknowledgments and examinations, do not constitute taxable items within the 2 Geo. 2, c. 23, s. 23. Ex parte Branson, 539.

Setting off.

6. Interlocutory costs may, under the 93rd rule of Hilary Term, 2 Will. 4, be set off against the final costs of the cause, without regard to the attorney's lien. Halliday v. Lawes, 475.

7. Costs of proceedings in bankruptcy cannot be set off against damages and costs recovered in an action in this court. Woodroffe v. Wootton, 364.

COVENANT.

Plea of no Rent in arrear.

1. In covenant on an indenture of lease, the breach alleged was, that, after the making of the indenture, and during the term thereby granted, to wit, on the 25th March, 1836, 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then elapsed, became and was and still is in arrear to the plaintiff &c. The defendant pleaded that no quarter's rent, ending on the said 25th March, 1836, then became or was due or in arrear by virtue of the said indenture in the declaration mentioned, in manner and form as the plaintiff had in his declaration in that behalf alleged:—Held, ill, on special demurrer. Baden v. Flight, 412.

For quiet Enjoyment.

2. The defendants demised to the plaintiff a mill-house and mill, with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder in which the same water then ran or flowed, and the flood-gates, sluices, and other waterworks therein, together with all erections &c.; excepting and always reserving out of the said demise and grant unto the defendants, their successors and assigns, so much of the said stream as should be sufficient for the supply of such and so many of the inhabitants of Plymouth, and all such bodies politic and corporate, officers, and departments of his majesty's service having establishments within or near to the said borough, or other person or persons whomsoever, as the defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat; provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted, times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted." And the defendants covenanted for quiet enjoyment by the plaintiff, his executors, administrators, and assigns, of the said "mill-house, mill, water-works, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever of or by M. Brodrick, her heirs, &c., or of or by the defendants, their successors or assigns, or any other person or persons whomsoever rightfully claiming or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement." The breach assigned was, that "the defendants, on &c., and on divers days &c., wrongfully and injuriously drew and took, and caused and procured to be drawn and taken from and out of the said stream divers large quantities of the water thereof, although the residue of the water of the said stream which on those days was left to flow to the said mill was not sufficient for the due working thereof for the space of twelve hours or any on either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof." At the

trial it appeared that no acts whatever had been done by the defendants since the date of the indenture to diminish the supply of water to the plaintiff's mill; that the only water drawn from the stream in question was taken for the supply of certain individuals under contracts entered into long before the grant to the plaintiff, and under an act of the 27 Eliz. c. 20, and another act of the 5 Geo. 4, c. 49, for the supply of another mill and a government victualling office:—Held, first, that the lease was not a demise of any specific quantity of water; secondly, that a diminution of water occasioned by the supplies above mentioned under contracts entered into by the defendants at a date prior to the making of the indenture, was not a breach of their covenant for quiet enjoyment; thirdly, that the breach was not well assigned. Blatchford v. The Mayor of Plymouth, 429.

And see CANAL COMPANY.

DEED.

Colorable Conveyance.

A conveyance was made by one L. to his son for the purpose of giving the latter a colorable qualification to kill game:—Held, that the attorney who prepared and attested the deed, knowing the purpose for which it was to be used, and himself actively furthering the object of the parties, could not afterwards (in trover by the son for the deed) contend that nothing passed to him under it. Lord v. Wardle, 402.

DISTRINGAS.

A distringas cannot issue after the expiration of the writ of summons. Abbotts v. Kelly, 256.

EJECTMENT.

Intituling Declaration in.

1. In ejectment the declaration was by mistake intituled as of Michaelmas Term, 8 Will. 4, instead of 7 Will. 4. The notice was properly dated:—Held, sufficient. Doe d. Phillips v. Roe, 359.

Setting aside Consent Rule.

2. Where in ejectment the consent rule has been made the means of committing a fraud upon the court, a party being thereby admitted as defendant who is a pauper and has no real interest in the premises, the court will interpose. Doe d. Carr v. Jordan, 370.

3. A motion for this purpose may be made, notwithstanding the proceedings have been stayed by a judge's order until delivery by the lessors of the plaintiff of a particular of the breaches of covenant for which the action is brought. *Ibid.*

And see EVIDENCE, 2—LANDLORD AND TENANT, 3.

ESTATE TAIL.

See REAL ACTIONS, 4.

EVIDENCE.

Confidential Communications.

1. A. being desirous of raising money upon property the title deeds of which were in the hands of the defendant, who had a lien thereon, applied to C., an attorney, to procure a loan for her. An abstract was furnished to him, which he compared with the original deeds, but ultimately declined to advance the money:—Held, that C. could not be permitted to use the knowledge thus acquired by him to the defendant's prejudice. Doe d. Peter v. Watkins, 155.

Interest of Witness.

2. In ejectment, the lessor of the plaintiff claimed as heir of one T. B.; the defendant as devisee of the person last seised:—Held, that the grandson of an elder brother of T. B., who himself claimed to be entitled to the property in question, was a competent witness for the defendant; he having no immediate interest in the event of the suit, and the verdict and judgment not being available as evidence for him in any suit that might be instituted by him against the defendant for the recovery of the same property. Doe d. Bath v. Clarke, 203.

3. The defendant took, as legatee of one W., a horse that had been for some time prior to his decease in W.'s possession, and sold him. The plaintiff, the original owner of the horse, alleging that it had never been sold to W., brought assumpsit for the price:—Held, that the executor and residuary legatee of W. was

a competent witness for the plaintiff, to prove admissions by W. in his lifetime that the horse was the plaintiff's property, and with him only on trial. Bowman v. Willis, 387.

Entries by deceased Clerks.

4. In order to prove a tender, the plaintiffs offered in evidence two entries made by a deceased clerk of the plaintiffs' attorneys in a diary kept by him according to the course of business in the office, in which it was his duty to enter daily every transaction in which he was engaged. By the first of these entries the clerk acknowledged the receipt by him of 100*l.* for the purpose of tendering it to the defendant. This was received without objection. The second entry was as follows: —"Attending Mr. L., tendering him 100*l.* for each of the plates, &c., when he declined to let me have same," &c. :—Held, that both these entries were properly admitted, both operating to charge the party by whom they were made, and appearing to have been made in the usual course of business, by a party having peculiar means of knowing the fact, and no interest in mis-stating it, and capable of being examined to the fact had he been living. Marks v. Lahee, 137.

Examinations under 1 *Will.* 4, *c.* 22—*See* WITNESS, 1.

Generally.

5. The plaintiff, in June, 1836, entered into a contract with the defendant's son (who was found to be his agent in the transaction) for building certain cottages. In September, 1836, an advertisement appeared in a newspaper circulating in the neighbourhood in which the defendant resided, intimating that the defendant and his son had succeeded to an estate in America, on the death of a relative, and were on a given day and at a certain place to receive a large sum of money. The defendant gave currency to a report that his son had gone to Philadelphia to take possession of the estate; whereas in fact he was in confinement on a conviction for a misdemeanor. About the time the advertisement appeared, one Bannister read it to the defendant, who assumed to give credit to it. In the month of January following, the defendant admitted that the advertisement was a fabrication, and that the contract on which the action was founded, though made by his son, was made by his (the defendant's) authority and for his benefit:—Held, that a copy of the newspaper containing the advertisement was admissible in evidence to shew that the father and son were acting in fraudulent concert; and that it was not necessary to shew that the copy produced was the identical copy from which Bannister read the advertisement to the deceased. Lucas v. Godwin, 502.

6. In order to take a case out of the statute of limitations, the defendant's nephew and clerk was called, and an account in the handwriting of the defendant was put into his hands, with the following memorandum (which the witness admitted to be in his handwriting) thereunder written:—"Paid 12*l.* 10*s.* interest to May 13, 1830." The witness professed to have no recollection whatever of this payment; but stated that he had a general authority to settle all accounts for his uncle:—Held, that this was evidence for the jury. Trentham v. Deverill, 128.

Non-judicial Documents.

See SPECIAL CASE.

And see WITNESS.

EXIGENT.

When tested.

On proceeding to outlawry by summons and distringas—*Quære* whether the first writ of exigi facias should be tested on *the return day* of the distringas or on the day on which the sheriff actually returns it—*Semble*, the former. Vere v. Gowar, 287.

EXECUTORS AND ADMINISTRATORS.

Possession of Assets.

1. Evidence that the testator had purchased some chairs twelve months before his death, and that they were seen two months before that event in the house where he resided with his mother and sister (the defendant):—Held, sufficient prima facie evidence to charge the defendant as executrix. Brittan v. Jones, 393.

2. The defendant took, as legatee of one

W., a horse that had been for some time prior to his decease in W.'s possession, and sold him. The plaintiff, the original owner of the horse, alleging that it had never been sold to W., brought assumpsit for the price:—Held, that the executor and residuary legatee of W. was a competent witness for the plaintiff, to prove admissions by W. in his lifetime that the horse was the plaintiff's property, and with him only on trial. Bowman v. Willis, 387.

Payment of Legacies.

3. A letter from the attorney of a creditor of testator to the attornies of his executrix, W., stating that his clients did not claim from W. payment of the debt as executrix of W. B. W. (the testator), but claimed from her individually, she having become liable, by payment of interest from time to time, to the debt:—Held, that this letter was no waiver of the creditor's right to sue W. as executrix; nor did it justify her executor in discharging a specific legacy before the debt. Richards v. Browne, 262.

Assent to Devise or Bequest to Remainderman.

4. The simple fact of an executrix, who is entitled to a life estate in a chattel under the will, taking possession of the chattel, is not evidence of an assent by her to the bequest to him in remainder. *Ibid.*

FALSE JUDGMENT.

Amendment of Return.

The sheriff's return to a writ of false judgment to remove proceedings from a Welsh county court consisting of a mere copy of the minute of proceedings entered shortly—the court remanded the transcript, that it might be amended, by more fully setting forth the proceedings, or that the sheriff might certify the course and practice of the county court, so as to shew what was meant by the several entries. Overton v. Swettenham, 483.

FOREIGN FUNDS.

A wager on the future price of foreign funds is not void or illegal, either by the 7 Geo. 2, c. 8, or at common law. Morgan v. Pebrer, 230.

FORFEITURE.

See Bond.

FORMEDON.

See Real Actions, 2, 3, 4.

FRAUDS, STATUTE OF.

See Statute of Frauds.

GOODWILL.

See Stamps, 1.

INCLOSURE.

The commissioners under an inclosure act were empowered to divide and allot common lands among the proprietors of common lands in the parish, and to assign any messuages, buildings, lands, tenements, hereditaments, new allotments, and old inclosures, in lieu of or in exchange for other messuages, buildings, lands, tenements, hereditaments, new allotments, and old inclosures, so that such exchanges should be ascertained, specified, and set forth in the commissioners' award, or in some deed to be executed by them, and so that such exchanges be made with the consent *in writing* of the respective proprietors; with a proviso for an appeal to the quarter sessions, within six months after the cause of complaint should have arisen. The commissioners, inter alia, allotted to Sir H. and Lady M., in respect of an estate in the parish, rented by A. W. and W. C., a piece of pasture land called Ludwell's Furze Close, containing about five acres, and another piece called Hill Close, late W. P.'s land, containing about four acres; and to W. P., a proprietor of meadow and arable land in the parish, in respect of his freehold estate, two acres of arable called Shortlands, late a common field, and sixteen acres of old inclosure called Stearts, late Sir H. M.'s. The award did not state that the several closes had been given in exchange for each other; but it concluded with an approval and confirmation by the commissioners of the exchanges made between Sir H. M. and W. P. There was no evidence of the consent in writing of Sir H. M. or W. P. to any exchange, save such assent as might be inferred from the award:—Held, that, in 1813, W. P. could not make a good

title either to Stearts or to Shortlands, although they had been in his possession ever since the execution of the award in 1798. Cox v. King, 553.

INITIALS.

See PRACTICE, 10.

INROLMENT.

Of Annuity-Deed—See ANNUITY, 2—STAMPS, 3, 4.

INSURANCE.

Abandonment.

1. Hides were shipped on board a vessel at Valparaiso for Bordeaux. The ship sailed from Valparaiso on the 13th May, and on the 7th July put into Rio de Janeiro in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impracticable to carry them in specie to the termination of the voyage, they being in such a state that they must either have been annihilated by putrefaction or thrown overboard, they were sold at Rio for one fourth of their value. On the 23rd July, the ship set sail from Rio on her voyage to Bordeaux, and was stranded on the 29th September at the entrance of the Garonne. In an action on a policy containing a memorandum declaring "cocoa and hides free of particular average unless the ship were stranded," it appeared that the assured received the news of the damage and of the sale of the hides at the same time:—Held—first, that this was not a stranding of the ship within the meaning of the memorandum, so as to entitle the assured to recover for an average loss—secondly, that the assured were entitled to recover as for a total loss, without abandonment. Roux v. Salvador, 1.

Stranding.

2. Semble, that the stranding of the ship after the goods which are the subject of the insurance are landed, is not such a stranding as to let in a claim for a partial loss on goods declared free from average unless the ship should be stranded. Roux v. Salvador, 23.

INTEREST.

See CANAL COMPANY.

INTERESTED WITNESS.

See EVIDENCE, 2, 3.

INTRUSION.

By whom maintainable.

1. A writ of intrusion is maintainable by one in remainder, for an intrusion made after the determination of an estate pur autre vie. Piercy, dem., Gardner, ten., 512.

2. One who claims under a devise may maintain a writ of intrusion—the case falling within the provision in the statute of Westminster 2, that, when a writ is granted in one case, and a thing happens in consimili casu, and needing a similar remedy, a writ should be made accordingly. *Ibid.*

Limitation in.

3. The time for suing out a writ of intrusion is limited, by statute 32 Hen. 8, c. 2, s. 2, to fifty years. *Ibid.*

JUDGMENT.

Entering—See PRACTICE, 14.

JUSTIFICATION.

See LIBEL.

LANDLORD AND TENANT.

Tenancy from Quarter o Quarter.

1. The defendants entered under an agreement "that they should become tenants of the premises at 375*l.* a quarter, the tenancy to commence on the 14th June, they paying a quarter's rent on that day; and that they should give security to pay one quarter's rent in advance as long as they should continue tenants;"—Held, that, under this agreement, the defendants did not become tenants from year to year, but from quarter to quarter only; and therefore that proof of such an agreement did not support an allegation that the defendants held "as tenants for a term of years, from year to year, for so long" &c., or "for the residue of a certain tenancy for a term of years," &c. Wilkinson v. Hall, 301.

Notice to quit, by whom.

2. A notice to quit given by one appointed by the landlord's agent to receive rents, is not sufficient, in the absence of a

recognition by the landlord of the party's authority to give the notice: the bringing an action founded upon the notice is not of itself a recognition. Doe d. Rhodes v. Robinson, 396.

Costs of Ejectment.

3. Where a defendant in an ejectment by mortgagee, for the recovery of the possession of the mortgaged premises, pays into court, under 7 Geo. 2, c. 20, s. 1, the principal and interest, the costs to which he is liable are to be taxed as between party and party. Doe d. Capps v. Capps, 468.

And see COVENANT.

LEASE.

Construction of.

1. The defendants demised to the plaintiff a mill-house and mill, with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder in which the same water then ran or flowed, and the flood-gates, sluices, and other waterworks therein, together with all erections &c.; excepting and always reserving out of the said demise and grant unto the defendants, their successors and assigns, so much of the said stream as should be sufficient for the supply of such and so many of the inhabitants of Plymouth, and all such bodies politic and corporate, officers, and departments of his majesty's service having establishments within or near to the said borough, or other person or persons whomsoever, as the defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat; provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted, times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted." And the defendants covenanted for quiet enjoyment by the plaintiff, his executors, administrators, and assigns, of the said "mill-house, mill, water-works, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever of or by M. Brodrick, her heirs, &c., or of or by the defendants, their successors or assigns, or any other person or persons whomsoever rightfully claiming or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement." The breach assigned was, that "the defendants, on &c., and on divers days &c., wrongfully and injuriously drew and took, and caused and procured to be drawn and taken from and out of the said stream divers large quantities of the water thereof, although the residue of the water of the said stream which on those days was left to flow to the said mill was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof." At the trial it appeared that no acts whatever had been done by the defendants since the date of the indenture to diminish the supply of water to the plaintiff's mill; that the only water drawn from the stream in question was taken for the supply of certain individuals under contracts entered into long before the grant to the plaintiff, and under an act of the 27 Eliz. c. 20, and another act of the 5 Geo. 4, c. 49, for the supply of another mill and a government victualling office:—Held, first, that the lease was not a demise of any specific quantity of water; secondly, that a diminution of water occasioned by the supplies above mentioned under contracts entered into by the defendants at a date prior to the making of the indenture, was not a breach of their covenant for quiet enjoyment; thirdly, that the breach was not well assigned. Blatchford v. The Mayor of Plymouth, 429.

Costs of Lease and Counterpart.

2. The plaintiff entered into an agreement with one J. S. for a lease of certain land in which J. S. had a life interest. By this agreement, which was drawn up by

the plaintiff, and signed by the parties in his presence, it was stipulated that the lease and counterpart should be prepared by the plaintiff at the expense of the defendant. The draft of the lease and counterpart were accordingly prepared and settled, but before they could be executed, J. S. died:—Held, that there was sufficient evidence of a retainer of the plaintiff by the defendant to entitle the latter to maintain an action for the costs of preparing the lease and counterpart. Webb v. Rhodes, 497.

LIBEL.

Case for a libel on the plaintiffs in their business of vendors of medicine, wherein the defendants claimed "the merit of having crushed the self-styled hygeist system of wholesale poisoning, since they commenced exposing the homicidal tricks of these impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pills;" and alleged that "several of the rot-gut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses; and in another part asserting that the plaintiffs were in insolvent circumstances. The defendants pleaded, as to the portions of the libel above set forth, that the plaintiffs manufactured, compounded, and sold pills by them denominated "Morison's universal vegetable medicines," and styled themselves and other vendors of the said pills, hygeists; that the plaintiffs were wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe and administer medicines of any kind; that the pills were composed of substances which, when unskilfully compounded, were of a highly dangerous and poisonous nature; that the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements, descriptive of the pretended qualities of their medicines; that two individuals (naming them) died in consequence of taking large quantities of the pills as suggested and recommended in the said advertisements; and that the parties who severally administered the same were tried, convicted, and imprisoned for manslaughter. At the trial the defendants proved the death of the two individuals from taking the pills in question, though in smaller quantities than those recommended; and that the doses to the extent advertised would, in the opinion of several eminent practitioners, have accelerated their deaths:—Held, that the plea was sufficient after verdict, though it contained no justification of the expressions "scamps and rascals;" and that it was not necessary for the defendants to prove the allegation in the libel, that they had "crushed the self-styled hygeist system of wholesale poisoning." Morison v. Harmer, 524.

LIEN.

In trover by the assignees of a bankrupt to recover the value of certain plates, the defendant set up a lien by agreement to which the plaintiffs replied that the defendant had received a sum in part discharge of his lien, and that they tendered him a certain other sum, *to wit*, 100*l.*, in satisfaction and discharge of the residue, such sum being more than sufficient to discharge the same, but that the defendant refused to receive it: the defendant rejoined that the said sum so tendered in satisfaction and discharge of the residue of the lien was not sufficient to satisfy and discharge the same:—Held, that the point in issue was, whether or not the 100*l.* tendered was a sufficient sum to cover the residue of the lien claimed by the defendant, notwithstanding the sum was stated under a videlicet; and that the *fact* of that sum having been tendered was admitted. Marks v. Lahee, 137.

LIMITATION OF ACTIONS.

Statute of Limitations.

1. In order to take a case out of the statute of limitations, the defendant's nephew and clerk was called, and an account in the handwriting of the defendant was put into his hands, with the following memorandum (which the witness admitted to be in his handwriting) thereunder written: "Paid 12*l.* 10*s.* interest to May 13, 1830." The witness professed to have no recollection whatever of this payment; but stated that he had a general authority to settle all accounts for his uncle:—Held, that this was evidence for the jury. Trentham v. Deverill, 128.

Under 3 & 4 Will. 4, c. 27, ss. 2, 3.

2. A case not comprehended within the 3rd section of the 3 & 4 Will. 4, c. 27, is not therefore excluded from the operation of the 2nd section. James v. Salter, 168.

3. Therefore, an annuitant claiming under a will is barred by that statute, where more than twenty years have elapsed since the right to the annuity first accrued to him, though he has *never* received any part of the annuity. *Ibid.*

Intrusion.

4. The time of suing out a writ of intrusion is limited, by the statute 32 Hen. 8, c. 2, s. 2, to fifty years. Piercy, Dem., Gardner, Ten., 512.

Writ of Right.

5. In counting on a writ of right, there must appear, either by express averment or by necessary implication, a seisin in fee in the demandant or in the ancestor from whom he claims, within sixty years. Dumsday, Dem., Hughes, Ten., 209.

LIMITATIONS, STATUTE OF.

See LIMITATION OF ACTIONS.

MARRIAGE SETTLEMENT.

See STAMPS, 3.

MISDIRECTION.

See NEW TRIAL, 2, 3.

MISNOMER.

See PRACTICE, 10, 11.

MONEY HAD AND RECEIVED.

Where Maintainable.

The defendant placed in the hands of the plaintiff certain instruments called Guatemala Bonds. The plaintiff sold them to one B., who paid him the market price, which he handed over to the defendant. A few days after the sale, B. returned the bonds to the plaintiff, he having discovered that they would not be recognized by the government by whom they purported to have been issued, by reason of their not being stamped. The plaintiff thereupon refunded to B. the sum B. had paid for them. It appeared that Guatemala Bonds on the Stock Exchange were understood to mean bonds duly stamped, and that unstamped bonds were utterly worthless. It further appeared that a stockbroker dealing in foreign stocks is treated with as a principal:—Held, that, under the circumstances, the plaintiff was entitled to recover against the defendant as for money paid to his use the amount repaid by the former to B.; and that it was competent to the plaintiff to rescind the contract without communicating with the defendant Young v. Cole, 489.

MORTGAGE.

The plaintiff mortgaged land in fee, with a proviso for redemption on payment of the principal and interest on the 5th June 1834: but it was agreed that the mortgagee should not be entitled to call in the principal before the 5th of December, 1840, provided the interest were regularly paid in the meantime; and it was further agreed that the mortgagor should peaceably and quietly have, hold, occupy, possess, and enjoy the premises, and receive and take the rents, issues, and profits thereof for his own use, until default made in payment of principal or interest, contrary to the aforesaid provisos or agreements for payment of the same:—Held, that, although, by the first part of the deed, the fee was vested in the mortgagee, the subsequent part operated as a re-demise of the premises to the mortgagor until the 5th December, 1840, provided the interest were regularly paid in the meantime. Wilkinson v. Hall, 301.

NEGLIGENCE.

See CASE.

NEW TRIAL.

Where Granted.

1. Where the particular of demand is so framed as to be calculated to mislead the defendant, the court will grant a new trial. Stevens v. Willingale, 255.

Misdirection.

2. It appearing probable that the jury had been misled by strong general expressions of the judge which properly applied exclusively to one of several issues, and the verdict being general—The court granted a new trial, *on payment of costs.* Lord v. Wardle, 402.

3. In case against a man for negligently and improperly keeping a stack of hay put together in such a state as to be likely to ignite, and which eventually does ignite, and his neighbour's premises are injured, the judge told the jury that the question for them to consider, was, not whether the defendant had acted according to the best of his skill and judgment in the adoption of measures calculated to avert the threatened danger, but whether he had acted with such a reasonable degree of caution as a prudent and careful man might have been expected to exercise; and that, if they thought the defendant had not acted with reasonable care and prudence, but had been guilty of gross negligence, the plaintiff was entitled to a verdict:—Held, that this direction was substantially correct. Vaughan v. Menlove, 244.

As to one of several Issues.

4. Semble that there cannot be a new trial upon one of several issues. Morison v. Harmer, 530.

NON OBSTANTE VEREDICTO.

See PRACTICE, 15.

NOTICE.

Of Dishonor—See BILL OF EXCHANGE, 7, 8.

OUTLAWRY.

1. The notice at the foot of a distringas stating that, in default of the defendant's appearance, the plaintiffs *would cause an appearance to be entered for him*, and the plaintiffs afterwards proceeding to outlaw the defendant—The court set aside the proceedings with costs. Vere v. Gowar, 287.

2. *Quære* whether the sheriff's return of non est inventus and nulla bona to a distringas issued with a view to proceeding to outlaw the defendant, dispenses with the necessity of leaving a copy of the writ at the defendant's place of abode, as required by the 3rd section of the 2 Will. 4, c. 39. *Ibid.*

3. On proceeding to outlawry by summons and distringas—*Quære* whether the first writ of exigi facias should be tested on *the return day* of the distringas, or on the day on which the sheriff actually returns it—*Semble*, the former. *Ibid.*

4. The defendant mortgaged to one J. P., for 3,000*l.* certain fee-farm rents. The principal being unpaid, and 450*l.* being due for interest upon the mortgage, a written contract was entered into between the defendant and J. P. for the sale to the latter of the rents in question for 3,785*l.* Pending the investigation of the defendant's title, J. P. died, leaving the plaintiff her executor and residuary legatee. After the draft conveyance had been settled and approved, the defendant being abroad, the plaintiff, without any notice either to the defendant or to his attorney (though he knew that the defendant was abroad, and that he had an attorney acting for him here), made affidavit that the defendant was indebted to him as the executor of J. P. in the sum of 3,550*l.* and upwards, for principal and interest, and sued out a capias, and caused it to be delivered to the sheriff with directions to return it non est inventus, and thereupon caused the defendant to be outlawed:—The court reversed the outlawry, with costs. Pigou v. Drummond, 573.

OVERSEERS.

See CHURCHWARDENS AND OVERSEERS.

OYER.

In an action by creditors of an intestate, in the name of the Archbishop, upon an administration bond, against a surety, it appearing that the action was brought without the knowledge or assent of the nominal plaintiff, and without indemnifying him against costs, and the judge of the Prerogative Court declining to permit the bond to be taken out of the registry for the purpose of giving the defendant oyer in the usual way (profert having been made by the declaration):—This court refused to make a rule that production of the bond to the defendant's attorney, at the plaintiff's expense, at the office in Doctor's Commons, or the delivery to the defendant's attorney of *an attested copy* of the bond, should be deemed sufficient oyer. Archbishop of Canterbury v. Tubb, 543.

PARTICULAR OF DEMAND.

Sufficiency of.

1. Where the particular of demand is so framed as to be calculated to mislead

the defendant, the court will grant a new trial. Stevens v. Willingale, 255.

Effect of Admission of Receipt in.

2. In *debt* for work and labour and goods sold and delivered, the plaintiff by his particular claimed 5*l.* for goods sold, admitting the receipt of 1*l.* 13*s.* on account. The defendant pleaded nunquam indebitatus to the whole declaration, and as to all but 3*l.* 7*s.*, part of the sum demanded in the second count, nunquam indebitatus, bringing that sum into court. At the trial the plaintiff failed to establish his demand for work and labour:—Held, that he was nevertheless entitled to a verdict for nominal damages; the admission of the receipt of 1*l.* 13*s.* in the particular merely amounting to evidence of the payment of that sum. Ernest v. Brown, 385.

PARTNERSHIP.

See BANK OF ENGLAND.

PATENT.

Sufficiency of Specification.

The plaintiff took out a patent "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes," and in his specification, which was inrolled in July, 1833, described his invention, in general terms, to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same might be applicable to; and then described more particularly three distinct objects which he proposed. The third object proposed by the plaintiff was, "to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which should be interwoven elastic cords or strands of Indian rubber coated or wound round with filamentous material:" he afterwards described the mode of effecting that object to be, "by introducing into the fabric threads or strands of Indian rubber which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise; these strands of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required; that, by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, he was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportion of the elastic and non-elastic material;" adding, "that the strands of Indian rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent, and, being in that state introduced in the fabric, they acquired their elasticity by the application of heat after the fabric was made:"—Held, that this invention was properly the subject matter of a patent, and that it was sufficiently described in the specification. Cornish v. Keene, 337.

PAYMENT.

In order to the validity of a payment to a bankrupt under the 6 Geo. 4, c. 16, s. 82, the *sale* in respect of which the payment is made must be a bona fide sale in the usual course of business. Devas v. Venables, 123.

And see PLEADING, 5.

PAYMENT INTO COURT.

Generally.

1. In *debt* for work and labour and goods sold and delivered, the plaintiff by his particular claimed 5*l.* for goods sold, admitting the receipt of 1*l.* 13*s.* on account. The defendant pleaded nunquam indebitatus to the whole declaration, and as to all but 3*l.* 7*s.*, part of the sum demanded in the second count, nunquam indebitatus, bringing that sum into court. At the trial the plaintiff failed to establish his demand for work and labour:—Held, that he was nevertheless entitled to a verdict for nominal damages; the admission of the receipt of 1*l.* 13*s.* in the particular merely amounting to evidence of the payment of that sum. Ernest v. Brown, 385.

Under 7 Geo. 2, c. 20, s. 1.

2. Where a defendant in an ejectment by mortgagee, for the recovery of the possession of the mortgaged premises, pays into court, under 7 Geo. 2, c. 20, s. 1, the principal and interest, the costs to which he is liable are to be taxed as between party and party. Doe d. Capps v. Capps, 468.

PLEADING.

Declarations.

1. In assumpsit against the drawer of a bill of exchange, the plaintiff must allege a promise to pay. Henry v. Burbidge, 296. [But see Griffith v. Roxbrough, 2 M. & Welsby, 734.]

Sufficiency of Consideration.

2. The declaration stated that the defendants represented to the plaintiff that certain mortgage deeds and writings had been deposited with W. L. B., one of the defendants, and one J. S.; that one H. R. was desirous of purchasing and taking an assignment from W. L. B. and J. S. of their interest in the said mortgage, for the sum of 500*l.*, and to obtain good bills to that amount to satisfy the said sum; that H. R. requested the plaintiff to accept for his accommodation two bills of exchange to be drawn by H. R. upon the plaintiff each for 250*l.*, payable to the order of H. R., for the purpose of enabling H. R. to negotiate the said bills for his own benefit; that H. R. offered the plaintiff, as a security for the repayment to him of such monies as he might pay upon the said bills, that he H. R. would procure the defendants to undertake to deliver to the plaintiff the said deeds and writings on the payment by him of such bills; that, in consideration of the plaintiff's accepting the said bills for the purpose and on the terms aforesaid, the defendants undertook and promised the plaintiff to deliver the said deeds to him on payment by him of the bills:—Held, that the declaration disclosed a sufficient consideration for the defendants' promise. Tipper v. Bicknell, 462.

Common Counts.

3. The plaintiff, in June, 1836, entered into a contract with the defendant's son (who was found to be his agent in the transaction) for building certain cottages, the defendant agreeing to pay the plaintiff "216*l.*, on condition of the work being done in a proper and workmanlike manner, on the 1st January, 1837, and to be completed on the 10th day of October, 1836." The cottages were not completed by the 10th October; but the defendant afterwards took the benefit of the contract:—Held, that the plaintiff need not declare specially on the agreement, but might recover on the common counts for work and labour and materials. Lucas v. Godwin, 502.

Assignment of Breaches.

See Covenant, 2.

Pleas in Bar.

4. To a count on a bill of exchange, the defendant pleaded, amongst other things, that the bill was delivered to the plaintiff as a security for the payment of differences on illegal contracts or wagers relating to Spanish stocks; the plea contained an averment that the price upon which the differences were to be paid was 67*l.* 7*s.* 6*d.* At the trial, there was no evidence as to the exact price stipulated for:—Held, that the allegation as to price was immaterial, and need not be precisely proved. Robson v. Fallowes, 43.

5. In assumpsit on a charter-party by which the defendant engaged, amongst other things, to pay a given sum per month for the hire of the vessel, and to provide a homeward cargo, with an indebitatus count for freight, and a count upon an account stated, the plaintiff assigned for breaches—first, that the defendant neglected to provide a homeward cargo—secondly, the non-payment of 200*l.* alleged to be due for four months' freight—thirdly, the non-payment of 200*l.* claimed by the indebitatus count for freight, and other 200*l.* claimed to be due on the account stated; concluding "to the plaintiff's damage of 300*l.*" The defendant pleaded, as to 476*l.*, parcel of the sums of money in the declaration mentioned, payment of that sum to the plaintiff before action brought, in full satisfaction and discharge of all the damages sustained by him as to that sum; and that the plaintiff accepted and received it in full satisfaction and discharge of such damages:—Held, bad on special demurrer; the plea not shewing in respect of what particular items of the plaintiff's demand the payments had been made. Lorymer v. Vizeu, 190.

6. In covenant on an indenture of lease, the breach alleged was, that, after the making of the indenture and during the term thereby granted, to wit, on the 25th March, 1836, 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then elapsed, became and was and still is in arrear to the plaintiff &c. The defendant pleaded that no quarter's rent, ending on the said

25th March, 1836, then became or was due or in arrear by virtue of the said indenture in the declaration mentioned, in manner and form as the plaintiff had in his declaration in that behalf alleged:—Held, ill, on special demurrer. Baden v. Flight, 412.

7. The plaintiffs declared on a contract for the sale to the defendants of "a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel Fortuna, the said cargo consisting of L R 240 casks, containing 901 salmes and 9 pignatelles, at 54*l.* per imperial ton." The defendants pleaded that the *casks* containing the oil in the agreement and declaration mentioned were not well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement in the declaration mentioned, but, on the contrary, were badly-seasoned and unfit and improper casks for the purpose of containing such oil:—Held, bad; the subject-matter of the contract being the *oil*, not the *casks;* and the defective state of the casks at most going only to a part of the consideration. Gower v. Von Dadelszen, 453.

8. Case for a libel on the plaintiffs in their business of vendors of medicine, wherein the defendants claimed "the merit of having crushed the self-styled hygeist system of wholesale poisoning, since they commenced exposing the homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pills;" and alleged that "several of the rot-gut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses;" and in another part asserting that the plaintiffs were in insolvent circumstances. The defendants pleaded, as to the portions of the libel above set forth, that the plaintiffs manufactured, compounded, and sold pills by them denominated "Morison's universal vegetable medicines," and styled themselves and other vendors of the said pills, hygeists; that the plaintiffs were wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe and administer medicines of any kind; that the pills were composed of substances which, when unskilfully compounded, were of a highly dangerous and poisonous nature; that the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements, descriptive of the pretended qualities of their medicines; that two individuals (naming them) died in consequence of taking large quantities of the pills as suggested and recommended in the said advertisements; and that the parties who severally administered the same were tried, convicted, and imprisoned for manslaughter. At the trial the defendants proved the death of the two individuals from taking the pills in question, though in smaller quantities than those recommended; and that the doses to the extent advertised would, in the opinion of several eminent practitioners, have accelerated their deaths:—Held, that the plea was sufficient after verdict, though it contained no justification of the expressions "scamps and rascals;" and that it was not necessary for the defendants to prove the allegation in the libel, that they had "crushed the self-styled hygeist system of wholesale poisoning." Morison v. Harmer, 524.

Pleas amounting to Non assumpsit.

9. To indebitatus assumpsit on a contract, the defendant pleaded specially another contract inconsistent with the contract declared on:—Held, bad, as amounting to non assumpsit. Morgan v. Pebrer, 230.

REPLICATION.

Materiality of Issue.

10. In trover by the assignees of a bankrupt to recover the value of certain plates, and also of certain etchings, prints, &c., belonging to the bankrupt, the defendant pleaded, as to the etchings, &c., that the bankrupt, on &c., and on divers other days and times afterwards, retained and employed him to impress and print divers etchings &c., that the bankrupt was indebted to him in a certain sum in respect of his said work and labour, and that he detained the said etchings, &c., as a security and lien for his said debt. The plaintiffs replied that the etchings, &c., were printed from ten different plates, and that the defendant was retained and employed by the bankrupt to print them under separate and distinct contracts and agreements:—Held, that the replication

did not tender an immaterial issue. Marks v. Lahee, 137.

PLEADING SEVERAL MATTERS.

See PRACTICE, 6, 7.

PRACTICE.

I. PROCESS.

To compel Appearance.

1. A distringas cannot issue after the expiration of the writ of summons. Abbotts *v.* Kelly, 256.

2. The notice at the foot of a distringas stating that, in default of the defendant's appearance, the plaintiffs *would cause an appearance to be entered for him*, and the plaintiffs afterwards proceeding to outlaw the defendant—The court set aside the proceedings with costs. Vere v. Gowar, 287.

3. *Quære* whether the sheriff's return of non est inventus and nulla bona to a distringas issued with a view to proceeding to outlaw the defendant, dispenses with the necessity of leaving a copy of the writ at the defendant's place of abode, as required by the 3rd section of the 2 Will. 4, c. 39. *Ibid.*

Irregularity in.

4. After an undertaking by the defendant's attorney to put in bail, in order to prevent an actual arrest (the party having already been arrested for the same debt, and discharged on the ground of an irregularity in the process), the defendant cannot object that the second arrest was improper, for want of a judge's order. Holliday v. Lawes, 354.

Intituling Declaration.

5. In ejectment the declaration was by mistake intituled as of Michaelmas Term, 8 Will. 4, instead of 7 Will. 4. The notice was properly dated:—Held, sufficient. Doe d. Phillips v. Roe, 359.

Pleading several Matters.

6. In trover for goods, the defendant was allowed to plead—first, not guilty—secondly, that the plaintiffs were not lawfully possessed of the goods—and two other pleas alleging a deposit of the goods in question in the hands of the defendant as a security for a bill discounted by a third person. Jaulerry v. Britton, 380.

7. Two counts upon the same contract, the one alleging the defendant to be liable jointly with another, the other alone, will not be allowed. Cholmondeley v. Payne, 418.

Setting aside and staying Proceedings.

8. A motion to set aside or vary the consent rule in ejectment, may be made notwithstanding the proceedings have been stayed by a judge's order until delivery by the lessors of the plaintiff of a particular of the breaches of covenant for which the action is brought. Doe. d. Carr v. Jordan, 370.

9. The defendant was arrested on the 28th March, and gave a bail-bond on the 4th April. The plaintiff declared de bene esse and took an assignment of the bail-bond, and the defendant afterwards, on the 17th April, (having given an undertaking to allow the plaintiff to go on with the original action notwithstanding the proceedings on the bail-bond) pleaded, and bail above justified on the 19th:—The court stayed the proceedings on the bail-bond, without allowing it to stand as a security, there being time for the plaintiff to go to trial at the last sitting in term, the defendant taking short notice. Clarke v. Vestris, 391.

10. The plaintiff described himself in his declaration as "Henry H. Lindsay:"—The court refused to set aside the declaration. Lindsay v. Wells, 471.

11. Semble, that the 11th and 12th sections of the 3 & 4 Will. 4, c. 42, apply only to the case of a misnomer of *the defendant*. *Ibid.*

12. After the issuing but before the service of the writ of summons, the defendant paid *the debt* to the plaintiffs' clerk, who was induced to receive it by the defendant's representation that he would not be thereby exonerated from any costs that might have been incurred. The plaintiffs' attorney, with knowledge of the fact of the debt having been paid, delivered a declaration. A judge at chambers having made an order to stay the proceedings *without* costs—The court amended it by making it operative *on payment of the costs of the writ*. Wyllie v. Phillipps, 474.

Rule to Compute.

13. A rule to compute was refused in an action of covenant for non-payment of

rent and land-tax. *Sed quære.* Morris v. Thompson, 295.

Entering Judgment.

14. The court will not deprive the plaintiff of the fruits of a judgment obtained by him on a special case argued and determined after the death of the defendant, though four terms have elapsed between the time of his obtaining and of his entering up the judgment, unless it be shewn that the defendant's estate has suffered prejudice by the delay. Green v. Cobden, 486.

Judgment non obstante Veredicto.

15. To a count on a bill of exchange, the defendant pleaded, amongst other things, that the bill was delivered to the plaintiff as a security for the payment of differences on illegal contracts or wagers relating to Spanish stocks: the plea contained an averment that the price upon which the differences were to be paid was 67*l.* 7*s.* 6*d.* At the trial there was no evidence as to the exact price stipulated for:—Held, that the allegation as to price was immaterial, and need not be precisely proved. The court, however, after argument and judgment for the defendant on a motion to enter a *verdict* for the plaintiff on the ground that the averment as to price should have been proved, granted a rule nisi to enter judgment for the plaintiff non obstante veredicto, on the ground that the plea, though proved, was no defence to the action. Robson v. Fallowes, 43.

Entering Satisfaction.

16. In an action by five plaintiffs, the court refused to allow satisfaction to be entered on the judgment-roll, on a warrant of attorney signed by four of them only, although it was sworn that the other plaintiff had gone to settle in America, and that the damages were merely nominal. Davis v. Jones, 202.

Opening Consolidation Rule.

17. An insurance cause had been twice tried, by special juries, and a verdict on each occasion found for the plaintiff:—The court refused to open the consolidation rule, in order to the trial of another action on the same policy; it not appearing that the case had not been fully brought before the two former juries—Vaughan, J., diss. Foster v. Allenby, 535.

Setting aside Execution.

18. Where a party has been improperly made a co-defendant in a cause, and the defence has been conducted in his name without his authority or knowledge, the court will relieve him from execution, where it appears, from the circumstances of the attorney, that he could have no remedy over against him. Stanhope v. Firmin, 39.

And see AMENDMENT—ARREST—PARTICULAR OF DEMAND—SET-OFF—SPECIAL CASE.

PRISONER.

Charging in Execution.

1. The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution. Stocken v. Wedderburne, 570; Whitmore v. Binns, 571.

Discharge under 48 *Geo.* 3, *c.* 123.

2. A defendant who has lain in prison twelve months upon a judgment for nominal damages and costs in an action of ejectment, is entitled to be discharged under the 48 Geo. 3, c. 123, s. 1, notwithstanding the costs exceed 20*l.* Doe d. Daffey v. Sinclair, 477.

PROFERT.

See OYER.

PROTECTED PAYMENTS.

See BANKRUPT, 2.

REAL ACTIONS.

WRIT OF RIGHT.

Form of Count.

1. In counting on a writ of right, there must appear, either by express averment or by necessary implication, a seisin in fee in the demandant or in the ancestor from whom he claims, within sixty years. Dumsday, Dem., Hughes, Ten., 209.

FORMEDON.

Setting aside Petit Cape.

2. In formedon, where the demand of view is objected to upon any ground arising on matter of fact, the proper course for the demandant is, to put in a counter-plea, if upon matter of law, to demur:

but to issue a petit cape is irregular.—Quære, whether a view can be demanded after a general imparlance? Tolson, Dem., Watson, Ten., 577.

Withdrawing Demand of View.

3. In a writ of formedon, the court allowed the tenant to withdraw a demand of view, on payment of costs, after the demandant had counterpleaded thereto that the tenant was in possession of the land demanded by the writ, and of none other in the parish. Tolson, Dem., Fisher, Ten., 569.

Formedon in Reverter.

4. A., seised of lands, settled the same, on his marriage in 1750, to the use of himself for life, and, from and after his decease, to the use of his widow, for her jointure and in satisfaction of her dower, and, from and after the death of them, the settlor and his wife, to the use of the first and other sons &c. successively, and, for want of issue, to the settlor's own right heirs and assigns for ever. The settlor died in 1753, without ever having had issue; whereupon his widow became seised in fee for the term of her natural life. The widow died in 1777. *Semble*, that the estate interposed between the first taker's life estate, and the remainder in fee, being an estate tail, and not a mere estate for life, a *writ of right* did not lie for the recovery of the lands, at the suit of the grandson of the nephew and heir of the survivor of the four nieces and coheirs of the settlor: but that the proper remedy was by a *formedon in reverter*, to be sued out within twenty years after the determination of the estate tail. Dumsday, Dem., Hughes, Ten., 227.

RE-DEMISE.

See MORTGAGE.

RIGHT, WRIT OF.

See REAL ACTIONS, 1.

RULE TO COMPUTE.

A rule to compute was refused in an action of covenant for non-payment of rent and land-tax. *Sed quære.* Morris v. Thompson, 295.

SALE.

Construction of Contract.

The plaintiffs declared on a contract for the sale to the defendants of "a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel Fortuna, the said cargo consisting of L R 240 casks, containing 901 salmes and 9 pignatelles, at 54*l.* per imperial ton." The defendants pleaded that the *casks* containing the oil in the agreement and declaration mentioned were not well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement in the declaration mentioned, but, on the contrary, were badly-seasoned and unfit and improper casks for the purpose of containing such oil:—Held, bad; the subject-matter of the contract being the *oil*, not the *casks*; and the defective state of the casks at most going only to a part of the consideration. Gower v. Von Dadelszen, 453.

And see BANKRUPT, 2.

SET-OFF.

1. Interlocutory costs may, under the 93rd rule of Hilary Term, 2 Will. 4, be set off against the final costs of the cause, without regard to the attorney's lien. Halliday v. Lawes, 475.

2. Costs of proceedings in bankruptcy cannot be set off against damages and costs recovered in an action in this court. Woodroffe v. Wootton, 364.

SHERIFF.

Duty and Liability of.

1. The sheriff's return to a writ of false judgment to remove proceedings from a Welsh county court, consisting of a mere copy of the minute of proceedings entered shortly—the court remanded the transcript, that it might be amended, by more fully setting forth the proceedings, or that the sheriff might certify the course and practice of the county court, so as to shew what was meant by the several entries. Overton v. Swettenham, 483.

2. A sheriff who seizes the effects of a trader under a a fi. fa. issued after a secret act of bankruptcy, and afterwards, but before the issuing of a commission,

sells or delivers over the goods to the creditor in satisfaction of the debt, is liable for the value in an action of trover at the suit of the assignees appointed under a commission subsequently issued against such trader. Garland v. Carlisle, 587.

And see POTTER v. STARKIE, 718.

SHIP AND SHIPPING.

See PLEADING, 5.

SPECIAL CASE.

On the argument of a special case, the counsel for the defendants, with a view to illustrate and explain the object and intention of a provision in an old act of parliament, proposed to read an extract from a printed book found in the Bodleian Library, dated 1706, and professing to contain the rules and regulations of the Company of Mine Adventurers of England; and also a document from the Rolls' Chapel, inrolled there as a deed of partnership of the Million Bank, dated 1698. The plaintiffs' counsel objecting — the court refused to permit them to be read. Bank of England v. Anderson, 83.

SPECIFICATION.

See PATENT.

STAMPS.

On Sale of Goodwill.

1. By a memorandum of agreement, the plaintiff agreed to sell to the defendant "two flies at 60*l.*; harness and *goodwill* included:"—Held, that the memorandum could not be received in evidence without a stamp. South v. Finch, 293.

On Mortgage.

2. At a vestry meeting the following resolution was agreed to, and signed by the churchwardens and overseers for the time being, and stamped with a 20*s.* stamp:—"The undersigned consent to the liquidation of the debt due to Dr. Wrench, amounting to 53*l.* 7*s.*; to be charged upon the income of the church land; 8*l.* 8*s.* to be collected by a church-rate; amounting in the whole to 61*l.* 15*s.*; such money so to be paid from the rents of the church land, after discharging the bills outstanding and such repairs of the church as may be ordered by the archdeacon for the time being during the progress of the above-mentioned liquidation:"—Held, that this entry, if operative at all, could only operate as a charge upon the land, and therefore a 20*s.* stamp was not sufficient to render it admissible in evidence. Wrench v. Lord, 381.

On Marriage Settlement.

3. By a marriage settlement, the defendant, in consideration of the marriage, of 4,000*l.* advanced by the father of the intended wife as a marriage portion, and of the natural love and affection which the defendant bore towards his nephew, the intended husband, covenanted to pay an annuity of 800*l.* a year to plaintiffs, to the use of the intended husband and wife during their joint lives:—Held, that the deed did not require an ad valorem stamp as upon the sale of an annuity the purchase-money for which amounted to 4,000*l.* Massey v. Nanney, 258.

4. Held also that the deed need not be inrolled under the 53 Geo. 3, c. 141, s. 2, *Ibid.*

STATUTE OF FRAUDS.

By a memorandum of agreement, the plaintiff agreed to sell to the defendant "two flies at 60*l.*; harness and *goodwill* included:"—Held, that the memorandum could not be received in evidence without a stamp. South v. Finch, 293.

STOCKBROKER.

The defendant placed in the hands of the plaintiff certain instruments called Guatemala Bonds. The plaintiff sold them to one B., who paid him the market price, which he handed over to the defendant. A few days after the sale, B. returned the bonds to the plaintiff, he having discovered that they would not be recognized by the government by whom they purported to have been issued, by reason of their not being stamped. The plaintiff thereupon refunded to B. the sum B. had paid for them. It appeared that Guatemala Bonds on the Stock Exchange were understood to means bonds duly stamped, and that unstamped bonds were utterly worthless. It further appeared that a stockbroker dealing in foreign stocks is treated with as a principal:—Held, that, under the circumstances, the plaintiff was

entitled to recover against the defendant as for money paid to his use the amount repaid by the former to B.; and that it was competent to the plaintiff to rescind the contract without communicating with the defendant. Young v. Cole, 489.

STOCK JOBBING.

A wager on the future price of foreign funds is not void or illegal, either by the 7 Geo. 2, c. 8, or at common law. Morgan v. Pebrer, 230.

SURETY.

See BOND.

TENDER.

In trover by the assignees of a bankrupt to recover the value of certain plates, the defendant set up a lien by agreement; to which the plaintiffs replied that the defendant had received a sum in part discharge of his lien, and that they tendered him a certain other sum, *to wit*, 100*l.*, in satisfaction and discharge of the residue, such sum being more than sufficient to discharge the same, but that the defendant refused to receive it: the defendant rejoined that the said sum so tendered in satisfaction and discharge of the residue of the lien was not sufficient to satisfy and discharge the same:—Held, that the point in issue was, whether or not the 100*l.* tendered was a sufficient sum to cover the residue of the lien claimed by the defendant, notwithstanding the sum was stated under a videlicet; and that the *fact* of that sum having been tendered was admitted. Marks v. Lahee, 137.

TRESPASS.

In trespass for breaking and entering the plaintiff's close, the defendant pleaded—first, not guilty—secondly, that the plaintiff was not lawfully possessed of the close—thirdly, a right of way. The jury found for the plaintiff on the first and second issues, *damages* 1*s.*, and for the defendant on the third. The associate having delivered the postea to the plaintiff—The court ordered it to be returned; the defendant having succeeded on the only real issue, and therefore being entitled to the general costs in the cause, and the award of damages on the first and second issues being clearly a mere slip. Staley v. Long, 491.

TROVER.

In trover for goods, the defendant was allowed to plead—first, not guilty—secondly, that the plaintiffs were not lawfully possessed of the goods—and two other pleas alleging a deposit of the goods in question in the hands of the defendant as a security for a bill discounted by a third person. Jaulerry v. Britton, 380.

See PLEADING, 10.—LIEN.

WAGER.

A wager on the future price of foreign funds is not void or illegal, either by the 7 Geo. 2, c. 8, or at common law. Morgan v. Pebrer, 230.

WITNESS.

Examinations on Interrogatories.

1. In an action on a life policy, in which the defendant had obtained a judge's order for the examination upon interrogatories (under the 1 Will. 4, c. 22, s. 4) of witnesses residing at Paris and Boulogne, the court, at the instance of the plaintiff, amended the order by adding to its terms, that the plaintiff be at liberty to cross-examine the witnesses viva voce, and the defendant to put additional questions; the cross-examinations and answers to be reduced into writing and returned with the commission. Pole v. Rogers, 479.

Attendance on Subpœna.

2. In an action on the case against the witness for neglecting to attend on a subpœna, the declaration stated that the plaintiff, at the time of serving the defendant with the subpœna, paid him a certain sum of money, to wit, *one shilling*, being a reasonable sum of money for his costs and charges in and about his attendance as a witness. The defendant pleaded that a reasonable sum for the costs and charges in and about the attendance of the defendant as such witness was not paid or tendered to the defendant: whereupon issue was joined. At the trial it appeared that the witness lived at Camberwell, the cause in which he was subpœnaed being to be tried at Guildhall; that, on the

plaintiff's attorney serving the defendant with the subpœna, the latter observed that he had already been subpœnaed by the other side: upon which the attorney said he supposed the defendant would not, as he had already received one guinea, require another, to which the defendant answered "Certainly not;" and that the attorney then gave him a shilling, which he accepted:—Held, that this evidence sustained the issue. Betteley v. M'Leod, 131.

WORK AND LABOR.

The plaintiff, in June, 1836, entered into a contract with the defendant's son (who was found to be his agent in the transaction) for building certain cottages, the defendant agreeing to pay the plaintiff "216*l.*, on condition of the work being done in a proper and workmanlike manner, on the 1st January, 1837, and to be completed on the 10th day of October, 1836." The cottages were not completed by the 10th of October; but the defendant afterwards took the benefit of the contract:—Held, that the plaintiff need not declare specially on the agreement, but might recover on the common counts for work and labor and materials. Lucas v. Godwin, 502.

WRIT OF RIGHT.

See REAL ACTIONS, 1.

WRIT OF TRIAL.

Where a cause (which has been made a remanet) is tried before the sheriff on a day subsequent to the return day of the writ of trial, the court will amend the writ. Sherman v. Tinsley, 286.

END OF VOL. IV.

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